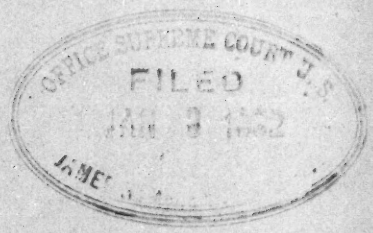

Supreme Court of the United States.

OCTOBER TERM, 1881.

The St. Louis Smelting and Refining Company
Plaintiff in Error,
vs.
Thomas Kemp and William Nuttall,
Defendants in Error.

No. 458.

Argument for Plaintiff in Error.

WALTER H. SMITH,
Of Counsel for Plaintiff in Error.

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Supreme Court of the United States.

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THE ST. LOUIS SMELTING & REFINING COMPANY, *Pl'ff in Error,*

vs. No. 458.

THOMAS KEMP AND WILLIAM NUTTALL, *Def'ts in Error.*

In error to the Circuit Court of the United States for the District of Colorado.

Statement.

This is an action of ejectment, brought by plaintiff in error, to recover possession of Lot No. 5, in Block No. 1, of the St. Louis Smelting & Refining Company's Addition to the City of Leadville. It was originally brought in the State Court, and was transferred, on motion of defendants in error, to the Circuit Court of the United States for the District of Colorado. The answer of the defendants was a denial of all the allegations of the plaintiff's complaint, except the one relating to its incorporation.

On the trial of the case in the Circuit Court the plaintiff gave in evidence a patent from the United States to one Thomas Starr, dated March 29, 1879, which included

the premises in controversy. The plaintiff deraigned title in itself from Starr to the lot in question.

The patent to Starr was a mineral patent, founded on Fairplay Mineral Entry, by Thomas Starr, No. 182, for mineral lot No. 255, for a placer mining claim, containing 164.61 acres, more or less. (Record pages 17,–24.)

After the plaintiff had rested the defendants offered in evidence a certified copy of the record of the proceedings in the General Land Office, upon which Starr obtained his patent.

The plaintiff objected to this evidence, but the court overruled the objection and allowed the record to go to the jury, to which the plaintiff duly excepted.

The defendants did not in any manner connect themselves with the paramount title or undertake to show that they ever had any interest in the premises. They were simply trespassers in possession.

And thereupon, after the evidence was closed, the court charged the jury that the record from the General Land Office showed that the claim of Starr was based upon several locations (12 or 15 in number), some of which were of 20 or 30 acres each, a portion of which was made prior to July 9, 1870, and the remainder after that date and up to 1877. It further charged that if Mr. Starr were the owner of these claims or had obtained them by purchase and they were valid and regular locations, then, in order to obtain a patent for them he was required under the law, to make a *separate* application for patent for *each* location, to post the notice on *each*, make *separate* publication for *each*, file a *separate* plat and survey for *each*, and do all the several matters required by law *on each separate* location, and that he had no legal right to consolidate the several locations in *one* application for patent, make *one* notice and *one* publication and

otherwise proceed as upon *one claim*, and that inasmuch as the record showed that he had proceeded as upon *one* claim and that was for 164 acres, the patent was void and the plaintiff's title failed.

To this ruling the plaintiff excepted.

ASSIGNMENT OF ERROR.

1. The court erred in allowing the record of the proceedings in the General Land Office to be given in evidence.

2. The court erred in charging the jury that Mr. Starr had no right to consolidate these several locations in one proceeding for patent, make one application for patent, post one notice, make one publication, &c., but that he must take all these several steps upon each location, and not having done so the patent was void.

ARGUMENT.

At the threshold of this investigation it is important to ascertain what is the legal effect of a land patent of the United States. What and how much does it import? Is it a potential muniment of title or is it some shadowy thing that can be brushed away and destroyed by every one whose interests may prompt him to attack it?

I shall maintain and prove that it is an instrument pregnant with significance and that it can be relied upon to establish title in all suits at law, when the United States had title and the Land Department had jurisdiction at the time the patent was issued, and that, unless void upon its face, it *conclusively establishes the fact that every pre-requisite, required by the law, did in fact exist at the time it was executed.*

I concede that it would be void if it should show upon its face that the land was not public land, as if a patent should issue for land in Massachusetts—a State which

never had any public land—or if it should be executed by an officer who never had authority to issue a patent —as for example an Attorney General—or if it should appear upon its face that the United States had, theretofore, rightfully issued a patent for the same land to some other person, or if it had issued without authority of law, or for an estate prohibited; but, subject to these exceptions, and perhaps some others of like character, a patent is conclusive in a court of law and can only be set aside by a direct proceeding, by bill in equity, in the name of the United States. In a proper case a person having a prior equity, may obtain a decree, in a court of chancery, that the patentee holds the legal title in trust for his benefit. Johnson vs. Towsley, 13 Wall., 72.

The construction that a patent should receive has often been the subject of consideration in this court, and has been uniform from the earliest cases to the present.

In Polk's Lessee vs. Wendell, 9 Cranch., 99, Mr. Chief Justice Marshall said:

"The laws for the sale of public lands provide many "guards to secure the regularity of grants, to protect "the incipient rights of individuals, and also to protect "the State from imposition. Officers are appointed to "superintend the business and rules are framed prescrib- "ing their duty. These rules are, in general, directory, and "when all the proceedings are completed, by a patent, "issued by the authority of the State, a compliance with "these rules is pre-supposed. That every pre-requisite has "been performed is an inference properly deducible, and "which every man has a right to draw from the existence "of the grant itself."

And in the same case in 5 Wheaton, 293, Mr. Justice Johnson said:

"It will be perceived, that as to irregularities, com- "mitted by officers of Government, prior to the grant, "the court does not express a doubt but that the "Government, and not the individual, must bear the

"consequences resulting from them. * * * * But "in admitting that the grant shall support the presump- "tion that every pre-requisite existed, it necessarily "admits that a warrant shall be evidence of the existence "of an entry."

In Bouldin vs. Massie, 7 Wheat., 157, Mr. Chief Justice Marshall said:

"This patent then must be considered as having issued "regularly on the documents required by the rules of the "office."

In Hoofnagle vs. Anderson, 7 Wheat., 212, Mr. Chief Justice Marshall said:

"It is not doubted that a patent appropriates land. "Any defects in the preliminary steps which are required "by law are cured by the patent. It is a title from its "date, and has always been held conclusive against all "whose rights did not commence previous to its emana- "tion. * * * * If the patent has been issued "irregularly the Government may provide means for "repealing it; but no individual has a right to annul it, to "consider the land as still vacant, and to appropriate it "to himself. * * These warrants are by law transferrable. "They are proved by the signature of the officer and "the seal of office. This signature and this seal are con- "sidered as full proof of the rights expressed in the paper. "No inquiry is ever made into the evidence received by "the public officer. If the purchaser of such a paper "takes it subject to the risk of its having been issued "erroneously there ought to be some termination to this "risk. We think it ought to terminate when the warrant "is completely merged in the patent and the title con- "summated without having encountered any adverse "claim."

In Boardman vs. Reed, 6 Pet., 342, Mr. Justice McLean said:

"This court has repeatedly decided that, at law, no "facts behind the patent can be investigated. * * * * "To entitle the plaintiffs to a recovery in the action of "ejectment they had nothing to do but to identify the "land called for in the patent. This being done, it is "not competent for the defendants, by way of invalid-

"ating the plaintiff's legal rights, to show irregularity "in the entry, or survey on which the patent issued."

In Bagnell vs. Broderick, 13 Pet., 448, Mr. Justice Catron said:

"As before stated the patent to John Robertson, Jr., "is deemed to have been issued regularly, and we must "presume that all the incipient steps had been taken "before the title was perfected. 5 Wheat.. 293; 7 "Wheat., 157; 6 Peters, 724, 727, 728, 342. * * * * "We are bound to presume that for the purposes of this "action that all previous steps had been taken by John "Robertson, Jr., to entitle himself to the patent, and "that he had the superior right to obtain it, notwith- "standing the claim set up by Byrne; and having obtained "the patent, Robertson had the best title (to wit the fee) "known to a court of law. Congress has the sole power "to declare the dignity and effect of titles emanating "from the United States, and the whole legislation of "the Federal Government in reference to the public "lands declares the patent the superior and conclusive "evidence of public title; until its issuance the fee is "in the Government, which by the patent, passes to the "grantee; and he is entitled to recover the possession "in ejectment."

In Minteer vs. Crommelin, 18 How., 87, Mr. Justice Catron said:

"The fact of abandonment, the Secretary was author- "ized to decide, and if he did so find, he might then order "the land to be sold as other public lands. The rule "being that the patent is evidence that all previous steps "had been regularly taken to justify making the patent; "and one of the necessary previous steps here being an "order from the Secretary to the register to offer the "land for sale, because the warrior had abandoned it, "we are bound to presume that the order was given. "That such is the effect, as evidence, of the patent pro- "duced by the plaintiff was adjudged in the case of "Bagnell vs. Broderick, 13 Pet., 450, and is not open to "controversy anywhere, and the State Court was mis- "taken in so holding."

In Field vs. Seaberry, 19 Howard, 324, Mr. Justice Wayne said:

"This case involves directly the point *whether*, when a "grant or patent for land or legislative confirmation of "titles to land has been given by the sovereignty, or "legislative authority only having the right to make it, "without any provision having been made in the patent "or by the law to inquire into its fairness as between "the grantor and the grantee, or between third parties, "a third party cannot raise in ejectment the question of "fraud as between the grantor and grantee, and thus "look beyond the patent or grant. We are not aware "that such a proceeding is permitted in any of the courts "of law. In England, a bill in equity lies to set aside "letters patent obtained from the King by fraud (Att'y "Gen'l vs. Vernon, 277, 370; the same case 2 Ch. Rep., "353), and it would in the United States; but it is a "question exclusively between the sovereignty making "the grant and the grantee. But in neither could a "patent be collaterally avoided at law for fraud.

In the Richmond-Eureka case, 4 Sawyer, 313, Mr. Justice Field said:

"It does not appear upon what locations the patents "were issued. They may have been, and probably were "issued upon locations made under the Act of 1866, "when such parallelism in the end lines of the surface "locations was not required. The presumption of the "law is that the officers of the Executive Department, "especially charged with the supervision of applications "for mining patents and the issue of such patents, did "their duty, and, in an action of ejectment mere surmises "to the contrary will not be listened to. *If, under any cir-* "*cumstances a patent for a location, without such parallelism,* "*may be valid, the law will presume that such circumstances* "*existed.*"

In view of these principles, so often and so vigorously asserted by this court, is the Starr patent, now in controversy valid, or void on its face? If it is valid then I shall show hereafter that the defendants were not in a position to attack its validity.

This patent (Record page 17) is in the usual form of all mineral patents issued by the Land Department. It recites that in pursuance of the provisions of the

Revised Statutes of the United States, chapter six, title thirty two, there have been deposited in the General Land office the plat and field notes of survey of the placer mining claim of Thomas Starr, accompanied by the certificate of the Register of the Land Office at Fairplay, in the State of Colorado, whereby it appears that, in pursuance of said Revised Statutes of the United States the said Starr did, on the 6th of March, A. D. 1879, enter and pay for said claim or premises, being mineral entry number 182 in the series of said office, designated by the Surveyor General as lot numbered 255, embracing a portion of the unsurveyed public domain in the county of Lake and State of Colorado, in the district of lands subject to sale at Fairplay, containing 164.61 acres of land, more or less, and according to the returns on file in the General Land Office bounded, described and platted as follows, &c.

The description by metes and bounds covers six solid printed pages of the record and includes twelve different tracts, *no one of which exceeds* 20 *acres for each individual claimant.*

The patent concludes in the usual manner and is executed in all respects as required by law.

The question returns: is this patent void on its face?

It is said by the defendants in error that it is and for the *sole* reason that it includes more than 160 acres—that under the laws of the United States no placer patent can issue for a larger area than 160 acres.

To this objection I have several answers.

1st. The patent does not show upon its face that it is for *more* than 160 acres.

It recites the quantity as 164.61 acres, *more or less.*

How can this court say; how can any one say, *from the face of the patent*, that the area is not less than 160

acres? The only possible method to show the contrary would be to make a mathematical calculation, which would involve a knowledge of trigonometry and surveying. Does the law presume that this court even, has such knowledge? And if it had, does the law require that upon the offer to introduce such a patent in testimony all proceedings shall be stayed until the calculation can be made? Does it point out any *modus operandi* by which it shall be made? Does it provide any compensation for the surveyor or college professor who may be called in, as *amicus curiæ*, to make the computation? Surely not, but on the contrary it will presume that the area is less than 160 acres; *if otherwise, the Land Department had no authority to issue it.* It will presume that the land officers did their duty and that they made the calculation and found that there were not exceeding 160 acres, *if otherwise, it would be illegal to issue the patent in the manner it was issued.*

2d. I deny that a placer patent may not issue to an individual for more than 160 acres even since the Act of May 10, 1872.

To make myself understood upon this point it will be necessary to review the legislation of Congress upon the limitation of locations. The first Act was that of July 26, 1866, 14 Stat. 251. It related to lode claims exclusively, and provided in its 4th section: "That no location hereafter made shall exceed 200 feet along the "vein for each location with an additional claim for "discovery to the discoverer of the lode. * * * * "*Provided further*, that no *person* may make more than "one location on the same lode, and not more than 3,000 "feet shall be taken in any one claim by *any association of* "*persons*."

The next Act was that of July 9, 1870, 16 Stat., 217. It defined what a placer claim was and provided in its

12th section, that "no location of a placer claim, made "after the 9th day of July, 1870, shall exceed 160 acres to "any *one person* or *association of persons.*"

Both of these Acts provide that locations may be made by persons or by associations of persons. The first makes it lawful for an association of persons to make a location much in excess of an individual. The last puts the individual and the association upon an equality and gives to each 160 acres.

The next Act was that of May 10, 1872. (17 Stat. 91.) By its 9th section it repealed the said 4th section of the act of 1866 in express terms. It did not in express terms repeal the said 12th section of the Act of July 9th, 1870, but *it provided a substitute for it* in these words:

"And all placer mining claims located after the 10th "day of May, 1872, shall conform &c. * * * and no "such location shall include more than twenty acres for "each *individual claimant.*"

Mark the language—*each individual claimant.* Not each person, or association of persons, but *each of the persons who may claim to be interested in a placer location shall have not more than twenty acres.* Implying, *ex vi termini*, that there may be more claimants than one in a location.

I submit that Congress in this Act of 1872, intended to revise the whole subject of mineral laws, and that this Act should be a substitute for all former Acts on that subject, to take effect after its date. It continues in force most of the provisions of the Act of 1870.

An examination of it will clearly establish the intent. The first section is nearly verbatim for the first section of the Act of 1866. The second section makes some changes in that of 1866. It limits the extent of vein or lode claims to 1500 feet in length along the vein or lode whether made by one or more persons. It

gives 300 feet on each side of the middle of the vein or lode; and requires that the end lines of each claim shall be parallel.

In short, without going into details, it provides a complete substitute for the old Acts. It abolishes the distinction between individuals and associations in locations of all lode and placer claims, and gives to each the same quantity.

It is settled law that such an Act will be held and construed to repeal all former Acts on that subject. In Bartlett vs. King 12 Mass. 546, the Court said:

"A subsequent statute, revising the whole subject "matter of a former one, and evidently intended as a "substitute for it, although it contains no express words "to that effect, must, on the principles of law, as well "as in reason and common sense, operate to repeal the "former; according to the case of The King vs. Cator, "4 Burr. 2026, in which it was decided that a former "statute, inflecting a penalty of 100*l* and three months' "imprisonment on persons enticing away artificers, was "virtually repealed by a subsequent statute, inflicting "500*l* penalty and twelve months' imprisonment for the "same offence. The same principle was adopted in the "case of The King vs. Davis, 1 Leach Cases 306. All "the subject matter of the Act of 28 Geo. 2, is con-"tained in the statute of 1785. *A part only of its restric-"tions and limitations, in the second section is omitted in the "latter;* and it is very obvious by comparing them, that "the legislature considered the latter as a complete sub-"stitute and repeal of the former."

Could more appropriate language be chosen for this case?—"A part of the restrictions and limitations in the former was omitted in the latter." That part of the limitation and restriction in the former relating to an association of persons is omitted in the latter.

In Nichols vs. Squire, 5 Pick. 168, the court said:

"We think that the statute of 1785 C. 24 upon which "the *qui tam* action is founded, is repealed, if not by "St. 1800 C. 57 (which seems to have a different object

"in view) yet certainly by St. 1817 C. 191, which "appears to cover the whole subject matter of the "statute of 1785. By the statute of 1817 the selling of "tickets in any lottery not granted or permitted by "this commonwealth, is prohibited under a new penalty; "and where the legislature impose a second penalty for "an offence, whether smaller or larger than the former "one, a party cannot be allowed to sue on one or the "other at his option. This point of a repeal by implica-"tion is supported by authority. In the case of Bart-"lett vs. King, 12 Mass. 537, an exceedingly useful "statute passed in 1754, concerning donations and be-"quests to pious and charitable uses, was held not to be "in force, the legislature having in 1785 legislated "upon the same subject and *omitted to re-enact the provisions "of that statute.*"

This construction makes the new Act sensible and removes it from the criticism that Congress had legislated upon one clause of the Act of 1870—that relating to persons, but, for some cause passed over the other clause—that relating to associations of persons.

Under this act the amount of the location depended upon the number of individual claimants in each. If there were three they could have sixty acres; if there were nine they could have 180 acres.

It follows that all Starr had to do to entitle him to a patent for more than 160 acres was to purchase a placer location that had been made by at least nine individual locators, and proceed to patent for the same. I shall show hereafter that locations were transferable, and that the purchaser might procure the patent in his own name.

It being possible for Starr to obtain title in this manner, the law for the purpose of sustaining his patent will presume that he did do it.

It also follows from this view that since 1872 there has been no limitation to the area of a placer location

except that it cannot exceed 20 acres for each individual claimant, and that the court below erred in holding that 160 acres was the limit.

3. The statute expressly provides that "two or more "persons, or associations of persons, having contiguous claims of any size, although such claims may "be less than ten acres each, may make joint entry "thereof;" 16 Stat. 217. Rev. Stat. 2330.

Now the "two or more persons, or association of persons, having contiguous claims" are either the *same* persons and associations or *different* persons and associations. In my opinion they are different, for the term "joint entry" in land law parlance is always understood to relate to lands claimed by different parties. Rev. Stat. 2274.

But, whether this is so or not, is not very material to my present argument. All mineral locations are assignable, and if assignable then the "contiguous claims," above referred to, if owned by the same persons may be sold and assigned to any one of said persons or associations, and if owned by different persons or associations they may in like manner be assigned to any one of such different persons or associations and the right given to the "two or more persons or associations" to make a "joint entry" *should be construed to authorize the assignee of such two or more persons or associations to make an entry in his own name.*

This principle of construction was adopted by this court in Polk's Lessee vs. Wendell, supra.

The statute in that case provided in its first section "That where *two or more persons* shall have entered, or "may hereafter enter, lands jointly, in one or more surveys, the surveyor is empowered and required to survey the same accordingly, in one entire survey; and "the persons so agreeing to have their entries surveyed,

"or entering lands jointly, shall hold the same as tenants "in common, and not as joint tenants."

It was argued that this section provided for entries made by two or more persons, and could not be applied to the case of distinct entries belonging to the same person.

But the Chief Justice said:

"The third section is applicable to the whole country, "but provides only for the case of entries made by two "or more persons. It is therefore contended that the "court cannot extend the provision to the case of dis- "tinct entries belonging to the same person.

"For this distinction it is impossible to conceive a "reason. No motive can be imagined for allowing two "or more persons to unite their entries in one survey, "which does not apply with at least as much force for "allowing a single person to unite his entries, *adjoining* "*each other*, in one survey. It appears to the court that "the case comes completely within the spirit, and is not "opposed by the letter of the law. The case provided "for is 'where two or more persons agree to have their "entries surveyed jointly, &c.' Now this does not pre- "vent the subsequent assignment of the entries to one "of the parties; and the assignment is itself the agree- "ment of the assignor that the assignee may survey "the entries jointly or severally, at his election. The "court is of opinion that, under a sound construction "of this law, entries, which might be joined in one sur- "vey, if remaining the property of two or more per- "sons, may be joined, though they become the property "of a single person."

I adopt the language of the court and say that in this case now before the court "for the distinction it is "impossible to conceive a reason. No motive can be "imagined for allowing two or more persons to unite," their claims in one application for patent and make a joint entry which does not apply with at least as much force for allowing a single person to unite the same

claims in one application and entry when he has purchased them and they are "adjoining each other."

The Act of 1870 gave to each person or association the right to locate 160 acres. Starr therefore had but to purchase enough contiguous claims to make 164 acres, (two would have been sufficient,) and include them in his application for patent.

And having the right to do so the court will presume it was done in order to sustain the patent.

4. Up to July 9th, 1870, Congress had never limited the area that might be included in a placer location.

Before that date everything was left to the local rules and regulations of miners. These rules were the outgrowth of the anomalous condition of things in the early history of mining on the Pacific Coast. The territory in which the mineral deposits were mainly found was acquired from Mexico by the treaty of Gaudaloupe Hidalgo of February 2, 1848. Soon thereafter, in 1849, gold was discovered by Capt. Sutter. The news spread rapidly over the entire country. As a result the people flocked to the gold regions in vast numbers. There was no law of Congress governing either the working of, or the acquisition of title to, the mineral lands. Congress debated the subject from year to year, but reached no conclusion until 1866.

In the meantime it became necessary to regulate this great industry in some way so as to prevent the strifes and conflicts that would result from unlimited license. The good sense of the mining population settled down upon the plan of inviting all interested within a given locality to meet together and form an association, and adopt certain prescribed rules regulating the size of mining claims, their mode of location, the kind of record that should be made thereof, and the amount

of work that should be required to preserve the respective claims and the neglect which should work a forfeiture of the same. They generally selected one of their number as a Recorder, and required every location to be filed with him for record within a given period from the date of location. By common consent these rules and regulations became the law that was universally recognized as governing their possessory claims. When Congress finally came to legislate on the subject in 1866 it found these mining districts scattered all over the mineral territory—each with its own code of procedure; some with one set of rules, and some with another, though in the main quite uniform; and in the very first section of the first law ever passed upon the subject of the mineral lands, it recognized and adopted these local rules and regulations, except when in conflict with the laws of the United States.

What the rules and regulations were for the particular district in which the lands now in controversy are found, does not appear in this record.

The patent does not recite the locations on which it was founded.

It has never been the practice of the Land Department to include them in the patent. They form a part of the record of the case and are necessarily matters that occurred antecedent to the issuing of the patent. For aught that appears this patent may have been issued upon a location made prior to July 9, 1870, when there was no statutory limitation upon the area of the location and upon a location justified by the local rules. And for the purpose of sustaining the patent it will be presumed, conclusively presumed, that it did. There is, there can be, no answer to this position.

The patent is not void on its face. Being a valid patent, the court erred in allowing the record of the proceedings in the Land Department to be given in evidence for the purpose of showing its invalidity, because the defendants did not so connect themselves with the paramount title as to justify their being permitted to attack it.

Under well settled decisions, it was error, to permit these defendants to give evidence *aliunde* the patent, to show its invalidity, they not having alleged or proved any prior equity, nor connected themselves in any form with the paramount source of title.

In Hoofnagle vs. Anderson, 7 Wheat., 212, Mr. Chief Justice Marshall said:

"It is not doubted that a patent appropriates land. "Any defects in the preliminary steps, which are re- "quired by law, are cured by the patent. It is a title "from its date, *and has always been held conclusive against "all those whose rights did not commence previous to its emana- "tion.* * * * * * The principle is well settled, in "other cases, that a patent is *unassailable by any title "commenced after its emanation*; and we perceive no suf- "ficient reason against applying the principle to this "case."

In Patterson vs. Winn, 11 Wheat., 380, Mr. Justice Thompson said:

"We may therefore assume, as the settled doctrine of "this court, that if a patent is absolutely void upon its "face, or the issue thereof was without authority or was "prohibited by statute, or the State had no title, it may "be impeached collaterally in a court of law, in an action "of ejectment. But, in general, other objections and "defects complained of *must be put in issue, in a regular "course of proceeding to avoid the patent.* * * * * To "permit an inquiry whether a warrant obtained under "such guards and checks was authorized by law, would "be opening the door to endless litigation and against "the spirit and policy of the land laws in general."

See also Field vs. Seaberry, 19 How., 332, before quoted.

In United States vs. Stone, 2 Wall., 535, Mr. Justice Greer said:

"A patent is the highest evidence of title, and is conclusive as against the Government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal."

In United States vs. Stone, 2 Wall., 525; Hughes vs. United States, 11 How., 568; Do vs. Do, 4 Wall., 232; and Moore vs. Robins, 96 United States, 530, the doctrine is clearly stated that the proper mode to set aside a patent is by bill in chancery.

In Cooper vs. Roberts, 18 How., 181, Mr. Justice Campbell said:

"The defendant further objects, that the officers of the State violated the statutes of Michigan in selling these lands, after they were known, or might have been known, to contain minerals. Without a nice inquiry into these statutes, to ascertain whether they reserve such lands from sale, or into the disputed fact whether they were known or might have been known, to contain minerals, we are of the opinion that the defendant is not in a condition to raise the question on this issue. The officers of the State of Michigan, embracing the chief magistrate of the State, and who have the charge and superintendence of this property, certify this sale to have been made pursuant to law, and have clothed the purchaser with the most solemn evidence of title. The defendant does not claim *in privity with Michigan, but holds an adverse right*, and is a trespasser upon the land, to which her title is attached. Michigan has not complained of the sale, and retains, so far as the record shows, the price paid for it. Under these circumstances, we must regard the patent as conclusive of the fact of a valid and regular sale on this issue."

In our case the United States has retained our money, paid for the land, and has not complained of the sale.

The decisions in the State courts are the same as in the Federal.

In Clark vs. Hall, 19 Mich., 356, Mr. Chief Justice Cooley said:

"The first objection seems to us equally untenable. "Spaulding, by virtue of his entry, acquired an equitable "right to the land, which he might assign; but the legal "title still remained in the Government. He has made "such an assignment as the Government has recognized "by making a conveyance to his assignee, and we doubt "the right of any person, *not claiming through or under "Spaulding*, to attack collaterally this assignment. A "sovereignty, in making title to its own lands, has a right "to determine for itself upon the sufficiency of whatever "goes to entitle the claimant to a conveyance; and, "*when the conveyance has been issued, a third person, not in "privity with the title, is not to be heard to allege that the con-"veyance has issued improvidently.* The cases of Stringer "vs. Young, 3 Pet., 320; Boardman vs. Reed, 6 Pet., "328; Bagnell vs. Broderick, 13 Pet., 436; and Minter "vs. Crommelin, 18 How., 87, are all authorities to the "point that when a patent has been issued by the Gov-"ernment, all the necessary pre-requisites are presumed to "exist. This presumption, we think, is as applicable to "an assignment, where the patent issues to an assignee "as to anything else which was essential to designate the "person entitled to the conveyance, or the land to be "conveyed."

In Boggs vs. Merced, 14 Cal., 362, Field Judge, said:

"The patent which is the final document issued by "the Government, is conclusive evidence of the validity "of the original grant, and of its recognition and con-"firmation, and of the survey, and its conformity with "the confirmation, and of the relinquishment to the "patentee of all the interest of the United States in the "land. It cannot be attacked collaterally, even for fraud, "whether charged to have existed in the procurement "of the original grant, or in the proof of its execution,

"or in the making of the survey. For these matters "the right of interference rests only with the Govern- "ment. Individuals can resist the conclusiveness of the "patent *only by showing that it conflicts with prior rights vested* "*in them.* * * * If settlers, after steps taken for "confirmation, could, by location, acquire such rights "to the premises as to authorize them to compel a "patentee, in every suit for the recovery of his land, to "establish the correctness of the action of the officers of "Government in their survey and location, the patent. "instead of being an instrument of quiet and security to "the possessor, would become a source of perpetual and "ruinous litigation and the settlement of land titles in "the country be delayed a quarter of a century. "The patentee would find it established in different "suits, to the utter destruction of his rights, that his "land should have been located in as many different "places within the exterior boundaries of the general "tract, designated in his grant, as the varying prejudices, "interests, or notions of justice of witnesses and jurymen, "might suggest."

It is true these remarks were made in reference to a patent for a private land claim, but they are suggestive in regard to an ordinary patent for land and were afterwards confirmed by this court in United States vs. Throckmorton, 98 U. S., 61.

In Mott vs. Smith, 16 Cal., 549, Field, Judge, said:

"The patent itself was, in this form of action, "(eject- "ment) "not only evidence, but conclusive evidence, "against the Government, and all parties claiming under "the Government, *by title subsequent*; much more so "against parties claiming no higher title—which is the "present case, so far as the record discloses—than that "of mere posession."

In Doll vs. Meador, 16 Cal., 325, Field, Judge, said:

"It is the record of the State that the land was subject "to location, under the grant of the United States, and "has been located through her officers in pursuance of "the terms of the donation, and, *as against parties who* "*have no higher right than that which arises from mere occupa-* "*tion it imports, absolute verity.* * * * * If it be issued

"in the absence of legislation directing a disposition of "the property described, or by an officer who is not in- "vested with power to sign the same, or for an estate "prohibited, its validity may also be controverted in "any action, either directly or collaterally; but, if the "authority to issue the patent depend upon the existence "of particular facts in reference to the condition or loca- "tion of the property, or the performance of certain ante- "cedent facts, and officers have been appointed for the "ascertainment of these matters in advance, who have "passed upon them and given their judgment—then the "patent, though the judgment of the officers be in fact "erroneous, cannot be attacked collaterally by parties "showing title subsequently from the same source, much "less by those who show no color of title in themselves. "In such cases the parties without title cannot be heard "at all, and the parties with subsequent title must seek "their remedy by *scire facias*, or bill, or information to "revoke the first patent, or limit its operation. * * * "The effect of the patent is to give security and quiet "to its holder, as to the title of the property which it "purports to transfer to him; but such patent would be "anything but an instrument of security and repose, if "every one not in privity with the original owner of the "title, but simply hoping that by some future action of "the Government, he may possibly possess some interest "in the property, could compel the patentee in every "instance in which he may seek the aid of the legal "tribunals, to establish the validity and regularity of the "action of the officers of the State in the selection, or ap- "proval of the selection of the land, and in the issuance of "the patent. Such is not the law, and in no case, which "we have been able to find in the wide range of Amer- "ican jurisprudence, has it ever been held to be the law. "On almost every subject of judicial investigation, we "find some differences of opinion; often it is true of a very "slight character in the adjudications of the different "States, but upon this proposition, *that a person without "title from a common or paramount source cannot attack and "overturn, in an action of ejectment, a patent which is regular "upon its face*, there is *no difference* of opinion, except "perhaps, that which may be inferred from a case in our "own court, which we will hereafter consider.

Bledvois Devises vs. Well. 4 Bibb., 329;
Alexander vs. Greenup, 1 Munford, 134;
Parmelee vs. Oswego R. R., 7 Barb., 621."

These authorities establish the doctrine that I contend for, and there are none to the contrary, either State or National. I have made a diligent examination and have failed to find a single authority to the contrary, and the fact that the learned and industrious counsel for defendants in error have been unable to produce a solitary one, is very strong proof that there are none.

Tested by these considerations I think it may safely be claimed that the first assignment of error is well taken.

II. I now proceed to consider the second asssignment of error, to wit: that the court erred in charging the jury that Mr. Starr had no right to consolidate these several locations in one proceeding for patent and that, having done so, the patent was void.

These instructions were given as to the legal effect of the proceedings before the Land Department. Those proceedings showed that there were sundry locations, all of which were regular and had been purchased by Starr, and consolidated in one proceeding for patent. The court held that this could not be done, but that there must be as many separate proceedings for patent as there were separate locations.

In examining this branch of the case I shall undertake to establish, first: that locations may be sold and transferred before patent; and second: that the land department had jurisdiction of the subject matter and party claimant, and was required to determine, as matter of law, the question whether several locations could be united in this one application and proceeding for

patent; and that its decision on that subject, whether right or wrong, was conclusive upon everybody in this action of ejectment, and could not be attached collaterally.

1. This court has determined in Myres vs. Croft, 13 Wall 291, that every interest in lands is assignable unless the assignment is prohibited by statute. That case was this: The statute relating to pre-emptions provided that "all assignments and transfers of the right "hereby secured prior to the issuing of the patent shall "be null and void." After an entry had been made but before patent, the right was assigned, and the question was whether such an assignment was valid. The court held that every valuable interest in land is assignable, unless prohibited by statute, and that the prohibition in this statute only related to assignments made before entry.

The mineral statutes have themselves settled the question of the assignment of locations. They contain provisions which clearly imply the right.

Sec. 2322 Revised Stat., "That the locators of all "mining locations * * * their *heirs and assigns*, * * * "shall have the exclusive right of possession and enjoy- "ment of all the surface included within the lines of "their locations, &c."

Sec. 2324—"Provided that the original locators, *their "heirs, assigns or legal representatives*, have not resumed "work upon the claim, &c."

Sec. 2332.—"When such person or association, *they "and their grantors*, have held and worked their claims, "&c."

These provisions, taken in connection with the ruling in Myres vs. Croft, make it certain that locations, properly made, are the subjects of sale and transfer, and that the purchaser stands in the place of the locator, and is clothed with all his rights. As a matter of fact

ninety-nine out of a hundred of all the mineral patents that have ever been issued have been issued to purchasers and not to the original locators.

There is no limit to the number of locations that may be purchased by a single person. He can purchase as many as he has the money to pay for and the disposition to acquire; and after the purchase he can hold them forever, as against all the world, except the government, by making the annual expenditures on each, prescribed by the statute. He is under no necessity of ever obtaining a patent; he has complete and entire protection without it. Sec. 2322—2324 Rev. Stat.

He may rely upon his possessory title. He takes it, however, with the limitation imposed by statute that each *location* shall not exceed a given area.

But subject to the limitation on the original locations, he may acquire placer claims to his heart's content.

If he wishes afterwards to acquire the fee simple, he must pay the government $5.00 per acre, and take certain steps pointed out by the statute.

2. A person having located a claim or purchased one or more from others who have located, must, before he can obtain a patent, comply with the requisites of the statute contained in Sec. 2325, Rev. Stat., which is in these words:

Sec. 2325.—"A patent for any land claimed and located "for valuable deposits may be obtained in the follow- "ing manner: Any person, association, or corporation "authorized to locate a claim under this chapter, having "claimed and located a piece of land for such purposes, "who has, or have, complied with the terms of this "chapter, may file in the proper land-office an applica- "tion for a patent, under oath, showing such compli- "ance, together with a plat and field-notes of the *claim* "*or claims in common*, made by or under the direction of

"the United States surveyor-general, showing accurately "the boundaries of the *claim or claims*, which shall be "distinctly marked by monuments on the ground, and "shall post a copy of *such plat*, together with a notice "of such application for a patent, in a conspicuous place "on the land embraced in *such plat* previous to the filing "of the application for a patent, and shall file an affi- "davit of at least two persons that such notice has been "duly posted, and shall file a copy of the notice in such "land-office, and shall thereupon be entitled to a patent "for the land, in the manner following: The register of "the land-office, upon the filing of such application, "plat, field-notes, notices, and affidavits shall publish a "notice that such application has been made, for the "period of sixty days, in a newspaper to be by him "designated as published nearest to such claim; and he "shall also post such notice in his office for the same "period. The claimant at the time of filing this appli- "cation, or at any time thereafter, within the sixty "days of publication, shall file with the register a cer- "tificate of the United States surveyor-general that "five hundred dollars' worth of labor has been expended "or improvements made upon the claim *by himself or "grantors;* that the plat is correct, with such further "description by such reference to the natural objects or "permanent monuments as shall identify the claim, and "furnish an accurate description, to be incorporated in "the patent. At the expiration of the sixty days of "publication the claimant shall file his affidavit, show- "ing that the plat and notice have been posted in a "conspicuous place on the claim during such period of "publication. If no adverse claim shall have been "filed with the register and the receiver of the proper "land-office at the expiration of the sixty days of publica- "tion, it shall be assumed that the applicant is entitled to "a patent, upon the payment to the proper officer of five "dollars per acre, and that no adverse claim exists; "and thereafter no objection from third parties to the "issuance of a patent shall be heard, except it be shown "that the applicant has failed to comply with the terms "of this chapter.

That is to say, having located or purchased, he must

1. File an application in the proper land-office, under oath, together with a plat and field-notes of the "claim or claims in common," showing accurately the boundaries of the "claim or claims."

2. He must post a copy of such plat, together with a notice of the application for patent in a conspicuous place on the land embraced in the plat, previous to the filing of the application for patent.

3. He must file an affidavit of at least two persons that such notice has been duly posted.

4. He must file a copy in the land-office.

5. The register must publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as nearest to such claim, and shall post such notice in his office for the same period.

6. The claimant must, during the period of publication, file with the register a certificate of the surveyor-general that $500 worth of labor has been expended, or improvements made, upon the claim by himself or his grantors, that the plat is correct, with such further description as shall identify the claim and furnish an accurate description to be incorporated into the patent.

7. He must, at the expiration of the sixty days of publication, file his own affidavit, that the plat and notice have been posted in a conspicuous place on the claim during the period of publication.

8. If no adverse claim has been filed with the register and receiver within the sixty days of publication, he must pay to the receiver $5.00 per acre and then he is entitled to his patent.

Every application for a patent for mineral lands that comes before the Commissioner of the General Land Office, or the Secretary on appeal, involves an inquiry

into all these several steps in the progress of the application, and also the question whether the lands are mineral.

If the lands are mineral and the applicant is asking for a patent for them, then the Land Department has jurisdiction of the subject matter—the land—and of the party—the applicant for patent, and this jurisdiction draws after it the right and the duty of hearing and determining all of the other questions that can possibly arise.

In the case at bar the land was confessedly mineral in character, and Thomas Starr was before the Land Department asking for a patent. *It therefore had jurisdiction of the subject matter and party.* Such being the case it became necessary to adjudge all the matters relating to his right to a patent, and to construe all provisions of law relating thereto. Suppose the Commissioner primarily and the Secretary on appeal erred in any or many of these questions? Would his decision be therefore void? Suppose the application was not under oath and he held it sufficient, would his decision be void or simply voidable? Suppose that he found from the proof that the plat and notice had not been posted in a conspicuous place on the land, but in an obscure place, and he held that sufficient? Suppose that only one person, instead of two, had made the affidavit that the notice had been duly posted and he held that sufficient? Suppose the applicant had omitted to file a copy in the Land office, and the Commisioner held that such an omission did not defeat his application? Suppose the register had not published the notice in a newspaper nearest to the land, but in some other, and had not posted the notice in his office during all the period of publication, but only for a part of the time, and the

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Commissioner held the proceeding sufficient? Suppose the certificate of the Surveyor General failed to state the amount of labor expended or improvements made, and that was adjudged sufficient? Suppose the applicant at the end of the sixty days of publication had departed this life and therefore could not make the affidavit that the plat and notice had been posted in a conspicuous place on the claim during the period of publication, but the affidavit had been made by some other person and that was held sufficient? Suppose an adverse claim had been filed on the 60th day of publication, excluding the first day, and counting the last, and on the 61st day, including the first, and the Commissioner had held that the adverse claim had not been filed in time and had disregarded it, and had proceeded to issue the patent?

Can a lawyer be found bold enough to say that in either of these cases the decision would be void? I think not. It would not be void. It would be voidable only.

Would it make any difference if several of those errors existed in any one case? Is it the number of errors that make the judgment void? Certainly not.

Now let us look into the proceedings in the Starr patent. Starr was before the Commissioner and Secretary claiming that he had purchased the several locations, and that he was entitled to a patent for them. His case showed that he had only made one application and given one notice. It therefore became necessary for the Commissioner and Secretary to determine whether that was sufficient. And that question depended upon the construction that should be given to that clause of the statute which speaks of "claims in common." Are they those that are held by the *same ownership*, or those that are held by two or more persons?

Counsel for defendants in error do not agree. One says it relates to the claims held by associations under the fourth section of the Act of 1866. It cannot do that because the said fourth section was itself repealed by the very Act, which, for the first time, made use of that term.

The other counsel says that it means claims held by two or more persons generally, that is estates, called, at common law, estates in common.

The Secretary held that it meant claims having the *same ownership.*

It has always been held in the land office that any number of contiguous locations might be embraced in one application, provided they were owned by the same party. This has always been the ruling in the commissioners office, and, what perhaps may be a little remarkable is that it has always been acquiesced in and has never been taken to the Secretary on appeal, except in this very case. This case was hotly contested, inch by inch, and it was claimed before the Secretary that the patent could not issue to Starr for more than 160 acres.

I make this statement advisedly, for I now have before me the printed argument made before the secretary, by counsel who resisted the application of Starr. The point was overruled.

I insist that the secretary *had jurisdiction to determine this very question,* and that his determination of it was conclusive "upon all the world and the rest of mankind," except the government, in a direct proceeding to set aside the patent. And it makes no difference whether it was rightly or wrongly determined. *In either case it was equally conclusive.*

Other legal questions were presented to the commissioner and secretary. One was the question whether

the limitation in the Act of 1870 of 160 acres to an association was not repealed by the Act of 1872. If it were, that single question was decisive of the case. There could then be no objection to the issuing of the patent.

Another was as to the construction that should be given to the section allowing a joint entry. If held to apply to the Starr proceeding, it was conclusive of the whole matter.

Whether, in point of fact, these questions were made before the secretary is not for me to say, but I have a right to presume that they were, and were determined by him in such manner as to justify the issuing of the patent. They were questions of law that arose upon the facts of the case and were of such a character as to end the objection then made and now made, if decided in a particular manner. I have a right therefore to presume that they were made and decided, because I have a right to presume that everything was done which might legally have been done and which was necessary to justify the action of the secretary. This court has acted upon that presumption at the present term in the case of Porter vs. Graves, No. 63.

In that case a judgment of the court below was set aside at a term which commenced more than two years after the end of the term at which it was rendered. There was nothing in the record to show that a motion had been made, at the term of the judgment, to set it aside. But this court presumed that such motion had been made and regularly continued until the judgment was set aside, because, otherwise, it was extremely doubtful whether the court had any jurisdiction to make the order.

This is not a case of a patent issuing "without authority of law." In one sense every patent issued upon proceedings which have not in all respects followed the provisions of the law is issued without authority of law. But it is not in that sense that the phrase is used in the decisions of this court.

The true sense was most admirably stated by Field, Judge, now Mr. Justice Field, more than twenty years ago, in the case of Doll vs. Meader, 16 Cal., 325, supra. He said:

"*If it* (the patent) *be issued in the absence of legislation* "*directing a disposition of the property described,* or by an "officer who is not invested with power to sign the "same, or for an estate prohibited, its validity may also "be controverted in any action, either directly or col- "laterally; but, *if the authority to issue the patent depend* "*upon the existence of particular facts, in reference to the con-* "*dition or location of property, or the performance of certain* "*antecedent facts, and officers have passed upon them and given* "*their judgment—then the patent, though the judgment of the* "*officers be in fact erroneous cannot be attached collaterally* "*by parties showing title subsequently from the same source,* "*much less by those who show no color of title in them-* "*selves.*"

In the present case there was no "*absence of legislation directing a disposition of the property described,*" but there was *a presence of abundant legislation to dispose of it,* being mineral land, and the only questions to be determined related to the "*existence of particular facts,* in reference to the *condition* or location of the property or the *performance of certain antecedent facts.*"

These questions were determined and cannot be questioned collaterally.

If they had been submitted to a court of general jurisdiction, and had been determined as they, in fact, were by the land department, I apprehend that there could be no doubt about the conclusiveness of the decision, and that it could not be attacked collaterally.

Upon this point I cite the following decisions of this court:

In Philadelphia and Trenton Railroad Company vs. Stimpson, 14 Peters, 458, Mr. Justice Daniel, in delivering the opinion of the court, said:

"The correct legal principle applicable to such pro-
"ceedings is this: That in every instance in which a
"tribunal has decided upon a matter within its regular
"jurisdiction, its decision must be presumed proper, and
"is binding until it shall be regularly reversed by a
"supreme authority, and cannot be affected, nor the
"rights of persons dependent upon it be impaired by
"any collateral proceeding. This principle has been too
"long settled to admit of doubt at this day, and has
"been repeatedly and expressly recognized in this court,
"as in the cases of Thompson vs. Tolme, 2 Peters, 157;
"The United States vs. Arredondo, 6 Peters, 720; Voor-
"hees vs. The Bank of the United States, 10 Peters,
"473, and the Philadelphia and Trenton Railroad Com-
"pany vs. Stimpson, 13 Peters, 458."

And in Cornett vs. Williams, 20 Wall., 249, Mr Justice Swayne, in delivering the opinion of the court, said:

"Jurisdiction is the power to hear and determine.
"To make the order of sale required the exercise of this
"power. It was the business and duty of the court to
"ascertain, and decide, whether the facts were such as
"called for that action. The question always arises in
"such proceedings—and must be determined—whether
"upon the case as presented, affirmative or negative ac-
"tion is proper. The power to review and reverse the
"decision so made, is clearly appellate in its character
"and can be exercised only by an appellate tribunal, in a
"proceeding had directly for that purpose. It cannot,
"and ought not to, be done by another court, in another
"case, where the subject is presented incidentally, and
"a reversal sought in such collateral proceeding. The
"settled rule of law is that jurisdiction having attached
"in the original case, everything done within the
"power of that jurisdiction, is to be held conclusive of
"the rights of the parties, unless impeached for fraud.

"Every intendment is made to support the proceeding. "It is regarded as if it were regular in all things, and "irreversible for error. In the absence of fraud no "question can be collaterally entertained as to anything "lying within the jurisdictional sphere of the original "case. Infinite confusion and mischiefs would ensue if "the rule were otherwise."

If it be said that these cases do not meet the question because they relate to courts of general jurisdiction, and the present case is different in that it relates to the acts of a public officer who necessarily has a limited jurisdiction, and the rule does not apply to him, then I call attention to the following opinions of this court:

In the United States vs. Arredondo, 6 Peters, 729, Mr. Justice Daniel said:

"It is a universal principle, that, where power or "jurisdiction is delegated to *any public officer*, or tribunal "over a subject matter, and its exercise is confided to "his or their discretion; the acts so done are binding, "and valid as to the subject matter; and individual "rights will not be disturbed collaterally for anything "done in the exercise of that discretion within the "authority and power conferred. The only questions "which can arise between an individual claiming a right "under the acts done, and the public, or any person "denying its validity, are power in the officer, and "fraud in the party. All other questions are settled by "the decision made, or the act done by the tribunal or "officer; whether executive,(1 Cr. 170-171.)—legislative, "(4 Wh., 423; 2 Peters, 412; 4 Peters, 563)—judicial, "(11 Mass., 227; 11 S. & R., 429; adopted in 2 Peters, "167-168)—or special, (20 J. R., 739-740; 2 Dow, P. "Cas., 521, &c.) unless an appeal is provided for, or other "revision, by some appelate or supervisory tribunal, is "prescribed by law."

In Ballane vs. Forsyth, 24 How., 183, Mr. Justice Greer, said:

"If he pretermitted his opposition to their location "and survey before the general land-office, he is con- "cluded by his laches. If his opposition was made un-

"successfully, the decision of that department upon his "objections is binding upon him."

In Johnson vs. Towsley, 13 Wall., 72, Mr. Justice Miller, in delivering the opinion of the court, said:

"That the action of the land-office in issuing a patent "for any of the public land, subject to sale by pre-emp- "tion or otherwise, is conclusive of the legal title, must "be admitted under the principle above stated, and in "all courts, and in all forms of judicial proceedings, "where the title must control, either by reason of the "limited powers of the court, or the essential character "of the proceeding, no inquiry can be permitted into "the circumstances under which it was obtained."

In United States vs. Schurz, 102, U. S. 400, Mr. Justice Miller, in delivering the opinion of the court, said:

"It is argued with much plausibility that the relator "was not entitled to the land by the laws of the United "States, because it was not subject to homestead entry, "and that the patent is, therefore, void, and the law "will not require the secretary to do a vain thing by "delivering it, which may, at the same time, embarrass "the rights of others in regard to the same land.

"We are not prepared to say that if the patent is "absolutely void, so that no right could possibly accrue "to the plaintiff under it, the suggestion would not be "a sound one. But the distinction between a void and "a voidable instrument, though sometimes a very nice "one, is still a well recognized distinction, on which "valuable rights often depend. And the case before us "is one to which we think it is clearly applicable. To "the officers of the land department, among whom we "include the Secretary of the Interior, is confided, as "we have said, the administration of the laws concern- "ing the sale of the public domain. The land, in the "present case, had been surveyed, and, under their "control, the land in that District generally had been "opened to pre-emption, homestead entry and sale. "The question whether any particular tract was open to "sale, pre-emption or homestead right, is in every "instance a question of law as applied to the facts for "the determination of these officers. Their decision of

"such question and of conflicting claims to the same "land by different parties is *judicial in its character.*

"It is clear that the right and the duty of deciding "all such questions belong to those officers, and the "statutes have provided for original and apellate hear- "ings in that department before the successeive officers "of higher grade up to the secretary. They have there- "fore *jurisdiction of such cases*, and provision is made for "the correction of errors in the exercise of that juris- "diction. When their decision of such question is "finally made and recorded in the shape of a patent, "*how can it be said that the instrument is absolutely void for* "*such errors as these.* If a patent should issue for land in "the State of Massachusetts, where the government "never had any, it would be absolutely void. If it "should issue for land once owned by the government, "but long before sold and conveyed by patent to another "who held possession, it might be held void in a court "of law on the production of the senior patent. But "such is not the case before us. Here the question is "whether this land had been withdrawn from the "control of the land department by certain acts of "other persons which include it within the limits of an "incorporated town. The whole question is one of "disputed law and disputed facts. It was a question "for the land officers to consider and decide before they "determined to issue McBride's patent. It was within "their jurisdiction to do so. *If they decided erroneously,* "*the patent may be voidable, but not absolutely void.*

In the light of these authorities I submit, with the highest confidence, *that the decision of the Secretary upon this Starr patent was not void.* In the most unfavorable view that can be taken it was *voidable only.*

And whether voidable or not depends upon the correctness of the construction given to the law by the Secretary, or rather, whether, in view of the practical construction that has always been put upon the law by the Land Department and the large interests that would be injuriously affected thereby, this court would now change that construction, were a direct proceeding

pending in the name of the United States for that purpose, and were the court in such doubt as to its correctness that if the question were *res integra* it would hold it to be erroneous.

A great many placer patents for more than 160 acres have already been issued. I now have in mind one for more than 800 acres, and another for more than 1,200 acres. Some of them are of immense value, running into millions in a single case. And a great many more have been issued for less than 160 acres, founded on more than one location and included in a single application for patent. The theory of the defense is that but a single location can be included in an application for patent. It follows, that, if their view should be adopted by this court, then, not only all patents which have issued for more than 160 acres are void, but also all patents for less than 160 acres, founded on more than one location and included in one application, are in like manner void. For this court so to hold would overturn a construction of the law, which has been uniformly adopted, by the only tribunal authorized to issue patents, and has thus become "a rule of property," and would bring confusion and utter ruin upon innocent men, who have trusted the Government and relied upon its sworn officers to see that their titles were properly made, and who have invested millions upon the faith that their patents were issued in due form of law.

Hitchcock Judge, in speaking of a question like this in Robbs' Lessee vs. Irwin, 15 Ohio, 703, said:

"But suppose there was a doubt upon the subject, "what course would a sense of duty require us to pursue? * * * * * "I hold this to be a safe and a sound "rule. Where a statue law receives a construction by "the judges constituting the judicial tribunals of the "State at the time, or where those tribunals adopt a

"practice under such a statute, such construction and "such practice becomes a part of the law. All taken "together, constitute a rule of right and property. "Rights are acquired, property is acquired in the full "confidence that while the statute remains unchanged, "the construction and the practice under it will remain "unchanged. Surely the propriety of such a construction "cannot be questioned after a great lapse of time. * * "If the construction is wrong the legislative power can "apply the remedy. And the remedy so applied, will "have prospective effect; but if the law or construction "of the law is changed by the court, such change strikes "at the foundation of all rights acquired under the "previous construction."

In Boos vs. Ewing, 17 Ohio, 520, Burchard, Chief Justice, said;

"Hence the great danger of unsettling by adjudication "—which always has a retroactive operation, a long "settled rule, which has been so incorporated into the "judicial system, as to become a rule of property. Such "is the character of the rule recognizing the vendor's lien. "It must exist as to past transactions. If the policy is "vicious, the legislature can change it and provide for "the future."

And this court, in Taylor vs. Thompson, 5 Pet., 368, in speaking of the rule that judgments were a lien on lands although there was no statue to that effect, said:

"The statute and its interpretation form together a rule "of title and property, which must be the same in all "courts. Property would be held by a very precarious "tenure and infinite confusion would be introduced, if "any court should now resort to its terms as presenting "the class of cases in which lands could be sold on execu-"tion and declaring it to extend to none other. It is "enough to know that by ancient, well established and "uniform usage, it has been acted on and considered as "extending to all judgments in favor of any persons; "and that sales under them have always been held and "respected as valid titles."

In National Bank vs. Whitney, 103 U. S., 102, Mr. Justice Field said:

"Judicial decisions, affecting the business interests of "the country, should not be disturbed except for the "most cogent reasons; certainly not because of subse- "quent doubts as to their soundness. The prosperity of "a commercial community depends in a great degree "upon the stability of the rules by which its transac- "tions are governed. If there should be a change the "legislature can make it with infinitely less derangement "of those interests than would follow a new ruling of "the court, for statutory regulations would operate in "the future."

3. The instructions to the jury were erroneous for another reason.

The limitation prescribed by the statute relates to the *location* only, and not to the patent.

A location is made by going upon the ground and after discovering the mineral, marking off the lands claimed by such boundaries as can be readily traced. In the case of lode claims it is generally done by erecting prominent monuments at each end of the claim and placing thereon a written notice that the locator claims the length of the line upon the lode, from stake to stake, and a specified number of feet on each side of the line. In placer claims the lines are prominently marked and notices posted so as to advise the world of the premises claimed. Where the custom of miners requires a location to be recorded, such recording is necessary. The record must contain the names of the locators, the date of the location, and such a description of the claim by reference to some natural objects or permanent monuments as will identify it.

When a valid location has been made it is transferrable and may be bought and sold as other property.

And if transferrable there would seem to be, in the nature of the case, no good reason why the purchaser should not be allowed to save the great expense that

would necessarily be incurred in pursuing a separate proceeding for each location, and it might reasonably be expected that such would be found to be the law. The Government has nothing to gain by requiring separate proceedings. It has expressly provided that when the claims are held "in common" all of the annual work required by law may be done on any one of them and it has virtually said that where one plat will include the claims "in common," they may be included in the application for patent. It has legislated upon the theory that more than one claim may be included in the patent, and as a matter of course if it may be included in the patent, it may be included in the antecedent proceedings which are to result in a patent. The Act of 1872, which is the first one in which the term "claims in common" (5th section) is found, provided in its 8th section that, "where a patent shall be issued as aforesaid "for *claims* upon unsurveyed lands, the Surveyor General, "in extending the surveys, shall adjust the same to the "boundaries of *such patented claim*, according to the plat "or description thereof, but so as in no case to interfere "with or change the location of any such *patented claim*."

Here is the plainest recognition that more than one claim may be included in a patent. Before patent it is "claims." After patent it is "patented claim."

That the limitation of the number of acres that may be included in a location is not a limitation upon the number that may be included in the patent, has virtually been decided, long since, by this court, in Polk's Lessee vs. Wendell, 9 Cranch., 87, *supra*.

In that case a patent had been issued by the State of North Carolina for 25,060 acres. It was claimed that this patent was void because, under the law of that State, *no entry* could be made, by any one person, in excess of 5,000 acres. The court held that the limitation of the

amount of the entry was no limitation upon the amount that might be carried into the patent. Mr. Chief Justice Marshall said:

"This act limits the amount for which an entry might "be made. But the same person is not in this Act, for- "bidden to make different entries; and entries were "transferrable. No prohibition appears in the Act, "which should prevent the assignee of several entries, "or the person who made several entries, from uniting "them in one survey and patent. The court does not "perceive, in reason or in the directions of law respecting "surveys, any thing which should restrain a surveyor "from including several entries in the same survey."

This question came before this court again in Patterson vs. Winn, 11 Wheat. 380 supra. In that case a patent had been issued by the State of Georgia for 7,300 acres. It was claimed to be void because under the law, no grant, to be carried into a patent, could exceed 1000 acres.

The court said:

"The proceedings of the Court of Franklin County, "on the application of Basil Jones, accompanying the "grant, by which it is ordered that he have 7,300 acres "in lieu of part of old warrants of John Peter Wag- "ner—bounty reserved. This shows that the aggregate "quantity of land mentioned in the grant was made up "of sundry old warrants, and affords an inference of the "existence of a practice of consolidating a number of "warrants in one grant; and there is nothing in the "land laws of Georgia, prior to the year 1794, at vari- "ance with such practice. The limitation as to quantity "will be found to relate to warrants for head rights, "and not to grants; and as warrants were transferable, "no objection existed to their being united in one "grant."

These authorities seem to me to be conclusive of the question.

It is said by counsel for defendants in error that Starr purchased some of these locations with the under-

standing and agreement that he should reconvey after he had obtained a patent. Suppose he did? What of it? He had a *legal* right to purchase them on any terms that were satisfactory to him and his vendor. They both had the right to avoid the great expense necessarily incurred in procuring patents. They understood the settled practice in the land department that contiguous locations were assignable and might be included in one application for patent. They availed themselves of that practice, and ought not now to be punished for having done so.

It is further said that the Starr patent does not include the plat.

It is not necessary that it should. The statute requires that the "pertinent description" shall be carried into the patent. It does not require that the plat shall. But, as matter of fact, the plat was included in the patent as the exemplication of the record, to be produced to the court will show.

It is also objected that the law contemplates that notice shall be given of the application for each claim so that adverse claimants may have an opportunity of asserting their claims, and that this would not be done if claims were consolidated in one application.

In practice the result is just the opposite of the theory. Consolidated claims are much better known than the smaller claims of which they are composed. Take the consolidated Virginia or the little Pittsburgh as examples. Any notice in regard to them would be much more readily understood than one relating to the numerous smaller claims included in them.

It is also objected that the paper published nearest a single location might not be the nearest to aggregated locations.

It would be exceedingly rare that the fact would be otherwise. Mineral locations are generally made in unsettled sections, and miles distant from towns or cities in which newspapers are published. Whether the placer claim included 160 acres or 640 or 1280 acres would not ordinarily make a difference of a mile in distance, and that would not require any change in the selection of the paper for publication.

It is further objected that the fees of the register and receiver would be increased by requiring a separate application for each location, and that might possibly save the United States the amount of those fees as it would, if the fees of those offices exceeded $3000 each yearly.

This objection may be dismissed with the single maxim, *de minimis, non curat lex.*

It is further said that Starr did not perform the necessary work upon each location and therefore resorted to a consolidation of his separate locations for the purpose of practicing a fraud on the government. The work and labor required for each claim is $500. It would therefore require but $6000 for the twelve locations included in the Starr patent, if proceedings were had on each separately.

There is no ground for the allegation that Starr did not perform all the work required. The record does not show it; but on the contrary it shows that he did perform all and more than was required.

The Deputy Mineral Surveyor certifies (Record, p. 66) that "the improvements consist of placer or gulch "mining, and a ditch known as the Starr Ditch, a house "16 x 30 feet, a stable 18 x 20 feet, which were placed "on the ground or claim by the claimant, and the value "of the labor and improvements is not less than $500, "and probably amounts to $10,000."

W. H. Stevens in his affidavit (Record, p. 74) says that he and his associates constructed a ditch from near the head of the Arkansas River to and upon the said Starr and Stevens & Leiter Mining Claims, so that 5000 inches of water could be and was carried to said claim for a distance of about eleven miles, and at a cost of about $40,000. They also constructed a bed rock flume in and upon a part of said claims and completed the same to the bed rock for the purpose and with the design of assisting in working the placer claims of the said Starr and Stevens & Leiter.

Hiram C. Vaughn and Daniel Houghton state in their joint affidavit (Record, p. 77) that they have been acquainted with the said Starr placer claim since June 17, 1860, and with those persons who have possessed and worked said claim, and "that the ground now em-"braced in said Starr placer claim was located and has "been possessed and worked in accordance with the "customs and usages of miners in said district, and in "conformity with the laws and regulations, governing "the location, holding and working of mining claims in "force and observed in the State of Colorado; that the "possession of Thomas Starr and his predecessors in "interest of in and to the ground included in the said "Starr placer claim has been actual, notorious and con-"tinuous, to the positive knowledge of deponent, since "the date above named, and that such possession has "been perfected and maintained in conformity with "mining usages and customs, and has been acquiesced "in and respected by the miners of the aforesaid dis-"trict * * * that the said Starr and his predeces-"sors in interest have expended in the improvement, "development and working of said claim a sum of "money exceeding $20,000 in actual placer mining "work."

Thomas Starr, in his affidavit, (Record, p. 58), states that he "and his grantors have worked and mined upon "said mining claim during the placer mining season of "each and every year since the year 1861, and have ex-"cavated and removed the surface, earth and gravel

"to the depth of six to fifteen feet from and over a "space of about twenty acres in the prosecution of said "placer mining work. This affiant has erected and "built a dwelling house 16 feet x 30 feet and two stories "high, also a barn 18 feet x 20 feet, both upon said "mining claim. The value of the labor done and im- "provements made upon said mining claim by the "claimant and by the grantors of the claimant is more "than $20,000."

These affidavits establish the fact that the work was done upon the claims embodied in the Starr application. But suppose they did not? It is not necessary that the work should be done on each claim, nor indeed upon any of them, if it were done *for the purpose of working* the claim. It might in that case be done wholly outside of its limits. Placer mining requires the use of vast amounts of water to wash the dirt and gravel, and separate them from the mineral. In many localities, and I might safely say in nearly all of them, the water must be brought from a great distance. It this case it was eleven miles distant from the Starr claim. The work and expenditures necessary to bring the water to the claim was work and labor on the claim. It must be so in the nature of things. It is common sense that it should be so regarded in law, and it always has been so regarded, and so adjudged whenever the question has arisen in the courts.

Judge Sawyer, in his charge to the jury in the celebrated case of The Jupiter Mining Company vs. The Bodie Consolidated Mining Company tried in the Circuit Court of the United States, for the District of California, in March, 1881, said:

"With regard to the work required to be done in "order to hold a claim, the jury are further instructed, "that where one person or company owns several con- "tiguous or adjoining claims capable of being advan-

"tageously worked together, one general system may be "adopted to work such claims. Such system may con- "sist of a shaft with drifts, cross-cuts and tunnels there- "from, and such works need not be upon *any of the* "*claims in question. When such system is adopted, work in* "*furtherance of the system is work on the claims intended to* "*be developed by it. Work done outside of the claims or out-* "*side of any claim, if done for the purpose and as a means of* "*prospecting or working the claim, is as available for holding* "*the claim as if done within the boundaries of the claim* "*itself.*"

This is good law. It was said in reference to the working of lode claims, and, *a fortiori*, is applicable to placer claims.

The record in this case shows that the plaintiff in error purchased the property in controversy before the city of Leadville had any existence, (Record, p. 51–53,) and that it had been worked and treated as placer mining ground since 1860. (Record, p. 77.)

The history of the country and the record inform us that the placer mining ground in California Gulch, where the city of Leadville now stands, and a portion of which is included in the Starr patent was mined as placer mining ground as early as 1859, and from that date to the present. It was known as the Pike's Peak Gold Regions. At least ten millions had been realized from the placer mining before the discovery of the carbonates in the vicinity of these lands in 1877.

When that discovery was made the history of the discovery of gold in California in 1849 repeated itself, and adventurers and persons anxious to become suddenly rich rushed to the scene where it was supposed that fortunes could be had without labor. They crowded every place. They took possession of every locality where rude habitations could be erected, without regard to the rights of the owners, and in the face of

their known wishes. They were a lawless band, and there was no method of compelling them to respect the rights of others. The only thing that could be done was to submit to the inevitable. They took possession of the lands of the plaintiff in error. It protested, but it was of no avail. Its only resource was to lay off the premises into town lots and allow them to be sold. This it did.

Stevens and Liter, who had like patents, did the same thing. As a consequence a majority of the occupants of the city of Leadville purchased the title held under the patents of Starr and Stevens & Liter, and are now in quiet possession under that title. More than seven thousand lots have been sold under said patents. But a few, a small portion, not exceeding 60 or 70 in number, refused to purchase. They are represented by the defendants in this writ of error. Suits have been brought against them and are now pending in the lower courts awaiting the decision of this case.

They have no equities. This plaintiff in error is the only party that has just ground of complaint, but it makes none. It comes into this court and asks that the law may be administered in its behalf impartially and without regard to the appeals which have been made in favor of these defendants, who are bold, naked trespassers and nothing else.

I have presented my views of this case at great length, but I could not well do otherwise, in view of the doubt, which I must suppose existed in the mind of the court, or a portion of it, and which led it to direct this re-argument, on the motion of defendants in error after the case had been argued and submitted and was in the hands of the court.

I have endeavored to remove this doubt by calling the attention of the court, in detail, to its oft repeated former utterances upon the controlling questions in this case, and I now submit it with the full assurance that what has been so often held before will be held now, and that the judgment of the court below will be reversed.

WALTER H. SMITH,
Of Counsel for Plaintiff in Error.

IN THE

United States Supreme Court.

October Term, A. D. 1881.

THE ST. LOUIS SMELTING AND REFINING CO.,
Plaintiff in Error,
vs.
THOMAS KEMP AND WILLIAM NUTTAL,
Defendants in Error.

Error to the Circuit Court of the United States for the District of Colorado.

Consolidated with the case of said Company against Sarah Ray et. al., for the purposes of this argument.

BRIEF AND ARGUMENT OF T. A. GREEN FOR DEFENDANTS IN ERROR.

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STATEMENT.

This is an action of ejectment or an action for the possession of real property under the Code of Colorado, commenced in the District Court of said State at Leadville, in the county of Lake, and afterwards removed to the United

States Circuit Court for the District of Colorado, in the city of Denver in said State.

It was tried in said Court before a jury at the October Term, A. D. 1879, and under the instructions of the Court that plaintiff could not recover, a verdict was rendered for the defendants, and judgment was entered on this verdict; and the plaintiff below has brought the case to this Court by writ of error, and assigns the following errors, to wit:

1. "The Court in admitting in evidence to the jury the copy of the proceedings had in the land office, and which certified copy of the proceedings contained copy of the notice of application for patent, proof of publication, the location certificates, deeds of conveyance, showing the possessory and pre-emption title to land to be in the patentee, Starr, and all the proceedings had in the Land Office pursuant to the provisions of the statute and the regulations of the Department to obtain an entry and patent to placer mining land."

2. "The Court erred in charging the jury as follows, that is to say: 'By that act an individual claimant was allowed to take more than twenty acres. He was limited to twenty acres as to the extent of his claim, but nothing was said as to the amount that could be taken by an association of persons, and probably the provisions of that act upon that question are still retained.'"

3. "The Court erred in charging the jury as follows, that is to say: 'Now upon these several provisions to which I have referred, it is to be said that a patent for a claim since 1870 can in no case exceed 160 acres, that is, for a single location; and it could not be so much except in case of an association of persons. An association of persons may take 160 acres; an individual claimant of any location made since 1872 can have only twenty acres. I think I stated to you that an act 1870 individuals and associations

were put upon the same footing, that either might take 160 acres; but when the act of 1872 went into force, and individual claimant was limited to twenty acres, and as nothing was said in this act as to quantity to be taken by an association of persons, they might still take 160 acres; so that since 1872 the law has been that an individual claimant may have twenty acres, and an association of persons can have 160 acres, and no more.'"

4. "The Court erred in charging the jury as follows, that is to say: 'So that when this patent came to be introduced for the purpose of showing whether it was upon a location made prior to 1870, we allowed the defendants to introduce the proceedings had in the Land Office, which showed distinctly the claim of Mr. Starr was based upon a number of locations (twelve or fifteen of them) some of twenty or thirty acres perhaps, and some of a less number of acres; and these locations were made from time to time, some prior to July, 1870, the date of the first act upon the subject, and some of them since that time, up to 1877, and so it cannot be said that this patent was issued upon a location made prior to July 9, 1870, but it is shown clearly that it was issued on the consolidation of several claims, some of them made prior to that time and some since that time.'"

BRIEF AND ARGUMENT.

PROPOSITION I.

The Placer Mining Patent issued by the Government to Thomas Starr, and from which plaintiff deraigned title, was issued, not only without authority of law, but in direct violation of law, and therefore was absolutely void.

First—The mining laws of Congress, in pursuance of which this patent was issued, are as follows, to wit:

Chap. VI, Sec. 2329, of the Revised Statutes of the United States, provides:

"That claims usually called *placers*, including all forms of deposit excepting veins of quartz or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings as are provided for vein or lode claims," etc.; and the following section (Sec. 2330) provides:

"That legal subdivisions of forty acres may be subdivided into ten acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; *but no location of a placer made after the ninth day of July, 1870, shall exceed one hundred and sixty acres for any one person or association of persons*, which location shall conform to the United States surveys; *and nothing in this section contained shall defeat or impair any bona fide pre-emption or homestead*," etc.

There are many other provisions of law touching the locating and patenting of placer mining claims, but the above provisions are all we need refer to under this head of our argument.

Eight years and more after the passage of the above law by Congress, Thomas Starr, *one person*, right in the face of the *express prohibition* of said act of Congress, had over 164 acres of ground consolidated into a *single claim—a single location*—and obtained a patent from the Government of the United States for the same.

It is true, that the claim only exceeds the limited amount 4 61-100 acres, but this is just as fatal as if it were a hundred, or even a thousand acres. The survey is *mathematically* certain, and appears on the face of the patent and is conclusive as to this matter; but the act of May 10, 1872, provides:

"*That no placer mining claim, or location, after 1872, shall include more than twenty acres for each individual claimant.*"

See Revised Statutes of the United States, Sec. 2331, p. 430.

As this act of 10th May, 1872, does not seem to repeal the act of July 9, 1870, in this respect, under these provisions, when taken together, since May 10, 1872, an association of eight persons may *jointly* locate not to exceed 160 acres of placer ground, under the mining laws of Congress, *but no individual can legally locate to exceed twenty acres.*

Now, this last act had been in full force for upwards of six years prior to the date of the patent in question, and the record shows that the consolidated claim made up from twelve to fifteen claims, or *pretended claims*, and fragments of claims, a few of which were located, or *pretended* to have been located, prior to the act of July 9, 1870, and that said claims were located at different times, from 1870 up to 1877.

Record, p. 103.

It will therefore be seen, that at the date of said patent, and at the time many of the *pretended* claims were located —all located after May 10, 1872—*one person* could only legally locate twenty acres, so that the patent in question actually contains a fraction over 144 acres more than allowed by law.

It would seem, from the brief summary of these mining laws, that no one would seriously contend for a moment that the patent in question was issued in substantial conformity with the said laws; but the learned counsel for plaintiff in error do most earnestly maintain that this patent is regular on its face, and in no substantial violation of said laws; and this is the *crucial* question in the case.

Counsel for plaintiff in error attempt first to evade this law by distinguishing between a *location* and a patent

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Counsel for plaintiff in error attempt first to evade this law by distinguishing between a *location* and a patent

They admit that the prohibition and limitation applies to a location of a placer claim, but maintain that it does not apply to the amount of land that may be included in a patent; but this reasoning is fallacious to the last degree. A valid location must precede a patent; that patent is based and founded on the location, and must be in *exact accordance* with the *location in every material respect* at least; *and, therefore, it was absolutely necessary that Thomas Starr should have a good and valid location of 164 61-100 acres of placer mining land before it was possible for him to legally obtain a patent, and it was necessary for him to have such a location before he could proceed one step towards obtaining a patent.*

After he had aggregated his numerous claims into *one single claim—one single location, for that is just what it was —of 164 61-100 acres, did he have a good and valid possessory title to it, under the acts of 1870 and 1872?* In fact, was not this a new location of over 164 acres? So far as separate locations were concerned, the old claims were wholly abandoned and a new claim created, and it was utterly impossible for him to hold 164 acres under *possessory* title, because the act of 1870 limited him to 160 acres, and the act of May 10, 1872, limited him to twenty acres. Even if this claim of over 164 acres upon which the patent was obtained was not a new claim, yet he could not take any claims he may have owned prior to July 9, 1870, and add to them a large number, or any number, of *new* claims from time to time up to 1877, and then throw them all into a *single location or claim*—these two words mean the same —and thereby acquire a good and valid *possessory right or pre-emption* to this whole tract? Certainly not. Will it be contended, then, that although he could not acquire a *pre-emption* and possessory right to this tract of mineral land, and that, although his location or claim of over 164 acres was in direct violation of law, that he could still obtain a

valid patent for the same? This would simply be legal nonsense.

Now, if Thomas Starr had had several good and valid placer mining claims, all separate claims, with separate surveys, and the necessary amount of work and improvements on each, and he had fully complied with the law in regard to each separate location or claim, and had simply embodied all of these claims separately in one patent, it would only have been a matter of mere form, and no good reason could be urged why such a patent should not be held good; but the present patent evades all the wise and substantial requirements of the mining laws of Congress, as I shall show hereafter.

But the counsel for the plaintiff in error, realizing the feebleness and absurdity of their argument on this point, fall back on *presumptions* to help them out.

Well, the Court below did indulge in a very *violent* presumption in their favor, and they ought to be satisfied in that regard. The Court below presumed for them that all of the mining ground included in the patent was located prior to July 9, 1870—nearly nine years prior to the date of the patent; and although we think this was a very unreasonable presumption after such a long lapse of time, still we care but little about it. We concede that all fair and reasonable presumptions should be indulged in to support a patent, but there should be some limits and some bounds to such indulgences, and that lapse of time should cut them off. If the Court below erred at all as to presumptions, it certainly erred against us.

But it seems to me the act of Congress cuts off this whole presumption business.

Section 2328, act of May 10, 1872, Revised Statutes of the United States, page 430, provides:

"That applications for patents for mining claims *now pending under former laws may be prosecuted to a final de-*

cision in the General Land Office, but in such cases where adverse rights are not affected thereby, patents may be issued in pursuance of the provisions of this chapter," etc.

This provision applies as well to applications for placer mining claims as for lode claims. The mining laws expressly so provide, and the section is referred to above.

Now, a fair construction of this provision requires *that all* applications for patent for mining claims, *not pending at that date*, must be prosecuted in pursuance of the provisions of that act. There is an exception touching patent proceedings already commenced in the Land Office at that date; but this exception excludes all other claims *located under former laws*, and, therefore, no *presumption* can be indulged in as to these claims having all been located prior to July 9, 1870, for even if that *were* the case they could only be patented in accordance with the provisions of the act of May 10, 1872. I presume the object of this provision was to cut off the *endless confusion* as to what constituted a mining claim, growing out of the conflicting and confused mining rules and regulations throughout the different mining States and Territories, by compelling all to conform to the mining laws of Congress in this regard, and thus prevent almost endless labor in the Land Offices and Land Department. It is true that even up to the present time, an application for a patent has to comply with the mining rules and regulations of the district in which the claim is located; but only with such rules and regulations as are not in *conflict* with the mining laws of Congress; and Congress had the power to *blot* out all of these rules and regulations at any time, or to change or modify them in any respect it might deem advisable. It may be urged that this would work a hardship upon those who had acquired *possessory rights* under former laws and mining regulations, but not so—at least not generally, and not to any great extent in any cases. If an individual owned placer territory

under former laws, he would be compelled to put it into claims of not more than twenty acres to obtain patents; and if an association of eight persons owned placer territory under former laws, they would be compelled to put it into claims not exceeding 160 acres to obtain patents. No former acquired rights as to possessory ownership would be at all interfered with; and even if such were the case Congress had the right to do so.

Now, if I am correct as to the construction of this provision, it cuts off all presumption that the claims included in the patent in question were located prior to July 9th, 1870; and that leaves this patent wholly and absolutely void on its face, without any reference to the record that was offered in evidence; and this ends this whole case, in my humble judgment.

However, if I am not correct in this, I shall show further on in my argument, that the Court below did not err in admitting the record of the Land Office in evidence. I also maintain that the presumption was unreasonable, and should not have been entertained by the Court below.

II.

Object and Policy of the Law.

First—It has been the policy of our Government to divide up the public domain, no matter whether agricultural or mineral, into reasonably small tracts, in order to prevent its being monopolized by speculators, and being swallowed up in vast tracts to be held for speculation, which would necessarily prevent and greatly retard the development of both our agricultural and mineral resources, and hence, there is great wisdom, as well as justice to our people generally, in this policy; and our Courts, both State and Federal, have upheld this spirit and object of our laws in

regard to the public domain; and, therefore, the Courts have adopted a rule of strict construction touching this matter.

Second—The object is not alone to prevent our public domain from being swallowed up in vast tracts for speculation, but the main object of these laws, in the limitations imposed, *is to insure improvement and development, and this object applies with peculiar force to our mineral lands.* Therefore, the acts of Congress require so much work to be done or necessary improvements made on *each mining claim* each and every year until a patent is obtained; and not less than $500 must be expended on each claim, lode, or placer, small or large, before a patent for the same can be obtained. It therefore becomes somewhat important to ascertain just what is a claim.

The words *claim* and *location* in our mining laws mean the same thing, and are used interchangeably, and both words have technical meaning.

Now, a placer claim, prior to July 9, 1870, and before there was any act of Congress in regard to such claims, meant an indefinite amount of placer ground as used by the miners; after July 9, 1870, a placer claim for either one person or an association of persons, meant an amount of placer ground properly located, not to exceed 160 acres. This remained the law till May 10, 1872, since which time to the present, a placer claim has been, for one person, not to exceed 20 acres; for two persons, not to exceed 40 acres; for three persons, not to exceed 60 acres; for four persons, not to exceed 80 acres; for five persons, not to exceed 100 acres; for six persons, not to exceed 120 acres; for seven persons, not to exceed 140 acres; for eight persons, not to exceed 160 acres; and under no circumstances can any placer claim or location exceed the 160 acres.

Now, upon each of these claims, whether large or small, so much expenditure in work or necessary improvements

is required each year before obtaining a patent, and an aggregate of $500 on each claim before a patent can be obtained at all. The law also requires a whole series of regular steps to be taken in regard to each claim, such as surveys, plats, notices posted on *each claim*, notice in paper published nearest the claim for sixty days, full proof under oath of the surveyor and of other witnesses that all these steps and requirements have been complied with as to *each claim* before a patent can issue, all of which requirements were necessarily disregarded in obtaining the patent in question. In fact, it may be truthfully said, that in obtaining the patent in the case at bar, all of both the *substantial* and *formal* requirements of the mining laws touching placer *locations* and *patent* were wholly disregarded and violated. Wherefore, this patent was issued by the ministerial officers of the Government in direct violation of both the letter and spirit of the mining laws of Congress; and we maintain, that the action of the ministerial officers of the Land Department were wholly *ultra vires* and *void*.

If these officers could thus violate the law and go beyond the power conferred upon them by law in this case, then they can legally issue a placer patent for 10,000 acres of the public mineral domain, or for the whole mineral domain of the United States for that matter, as a *single placer* mining claim. In fact, if this patent be sustained by this Court, all of the salutary limitations of the mining laws of Congress will be virtually swept away, and the public mineral domain be thrown open to vast monopolies without any limitations or restraints.

This is just what a certain class in our mining States and Territories are moving Heaven and earth to accomplish! In fact, they have been wholly disregarding those mining laws to a large extent, as in the case at bar, and the counsel for plaintiff in error even urge the fact that much of our mineral land has been illegally monopolized in this manner

as a reason why this Court should, if at all possible, sustain this patent. I believe that it is estimated that about $300,000,000 worth of property in all of our mining States and Territories is held in this manner, and that the decision in this case will indirectly determine the title to all of this property. This may or may not be true; but this decision will indirectly determine the title to all the land on which Leadville is built, and other valuable placer claims in Lake county, Colorado. But all this only shows how extremely difficult it is to prevent speculators from breaking down all the *barriers* of the law, and swallowing up our valuable mineral demain in vast tracts for speculation, and demonstrates the great necessity of a decision of this Court sustaining the letter and spirit of our mining laws in this regard.

If the ministerial officers of the Land Department can violate the law, as they have done in this case, then they are above the laws and above Congress, and above the Government itself; and there is no limit to their power in this regard, and our whole public mineral domain is absolutely in their power, to dispose of in such quantities as they may chose, and all the restraining terms and conditions imposed by the mining acts of Congress are evaded and substantially swept away.

I, therefore, maintain that the charge of the Court below was correct on this point, and that there is no error in the record touching this matter, on a mere consideration of the provisions of the mining laws of Congress themselves; but I shall now proceed to show, by a brief and rapid review of the authorities, that the Court below did not err in regard to any material question in the case.

The counsel for the other side seem to rely largely on the decisions of the Land Office, and I must mention these before I proceed to examine the authorities proper.

It is true that the Land Department, in November, 187–

and in July, 1874, decided in their favor (1 C. L. O., 134, and C. M. D., 211); but the same office, in November, 1874, decided as follows, to wit:

"After the 10th of May, 1872, no placer claim or location made by an individual can exceed twenty acres, and no location made by an association can exceed 160 acres."

See 1 C. L. O., 134.

This last decision is directly in our favor; but these decisions are not entitled to much weight in this Court, or anywhere else, as they are continually changing, and cannot be at all relied on, and, I presume, are not generally made by lawyers even.

This brings me to the authorities proper, and the first I shall refer to is an opinion by the venerable Chief Justice Marshall in 1815. It is the case of

Polk's Lessee vs. Wendell, 9 Cranch., 87-102.

It is referred to by the other side, but I think it settles this whole case at bar in our favor; at least, it settles every principle of law applicable to the present case. It grew out of a patent issued by the State of North Carolina; but the whole doctrine touching patents and grants is discussed, and also the manner in which patents may be attacked in actions of ejectment.

It was an action of *ejectment*, and the plaintiff, who was attacking a patent offered in evidence by the defendant to show title, and which was *all regular on its face*, offered to prove by evidence *dehors* the face of the *instrument*, that the *warrants* on which the patent had been issued *were forgeries*, and that *no entries* had been made, and no *purchase* from the State; and this evidence was all held to be admissible. I understand this to have been a jury trial, in which the jury were to find from the evidence the facts which would render the patent void in an action of ejectment; so that what appeared on the face of the instrument had noth-

ing to do with the case, and this case sweeps away all that doctrine from plaintiff in error.

The Court then held, that if the State had no title, or the officers who issued the patent had no authority to do so; or if the entries had not been properly made; or if the land warrants on which the patent had issued had been forged, that the patent was void, and that all such matters could be examined into in an action of ejectment at law, and that all proper facts dehors the face of the instrument showing the patent be void, were admissible in evidence for that purpose.

Judge Marshall in this case clearly draws the line between objections to government patents that *must* be taken in Courts of equity and those objections that may be taken in actions of ejectment in Courts of law. See page 99 of this case.

This case laid the *foundation* for this whole doctrine in regard the validity and invalidity of Government patents, and the manner in which the same might be attacked and overthrown in both Courts of law and equity.

But this decision was not allowed to remain unchallenged. Some five years afterwards this case was carefully reviewed in this Court,—the same case of Polk's Lessee, vs. Wendell being again before the Court. (See 5 Wheaton, 301 to 312.) Johnson, J., delivers the opinion of the Court, and after a careful review of Judge Marshall's opinion, the whole doctrine was re-affirmed.

This doctrine was again before this Court in 1876, in the case of Patterson vs. Winn, 11 Wheaton, 381 to 391. The two former decisions were again reviewed and sanctioned, and the opinion of Chief Justice Kent in the case of Jackson *ex dem.* Mancius vs. Lawton, 10 Johnson, 22 to 25, referred to, and after considering the authorities and discussing the law generally, the Court declared that the doctrine was well settled and could no longer be questioned, and that all patents issued without authority of law or in viola-

tion of law, or where the officers have no authority or power to issue the same, or where essential conditions of the law have not been complied with, or the warrants on which they issue are forgeries, are wholly void, and that all such defenses may be interposed in actions of ejectment in Courts of law.

In this last case, the Court say that: "In general the validity of a patent for lands could only be impeached for causes *anterior* to its being issued in a Court of equity. But where the grant is *absolutely void* upon its face, or where the State has no title, or the officer no authority to issue the the grant or patent, the validity of the same may be contested at law.

This case was most carefully considered by Thompson, J., and it also bears on the question as to how an objection may be taken to such a *patent* in an action of ejectment; and the Court held that the defendant might simply object to its going in evidence at all. I shall fully consider this question further on.

It is true, that the laws under which these actions accrued were different in many matters of detail from the present mining laws of Congress, out of which the present cases have grown, but the broad doctrine is well established by these authorities that we are contending for in the case at bar. In those cases there were no *essential underlying conditions*, as working and improving the lands granted, such as we have in our present system of mining laws—at least, there were but few conditions of the kind, as those were agricultural and timber lands, whereas the acts of Congress under discussion here pertain wholly to mining claims, and the working and developing of the same; and all of the provisions of the acts of Congress calculated to secure the developing of our mineral domain are both wise and essential to that end, as I have shown above. It did not defeat the main object of those laws, nor any of their

material terms and conditions, to allow different tracts to be consolidated into one survey; but to allow that to be done under our mining laws, as was done in the case before us, would simply defeat all of their salutary provisions to insure development and prevent monopolies. I simply ask that the general principles of the cases above referred to be applied to the facts and the mining laws of Congress touching this case.

The authorities referred to are so high, so well founded, and have stood so long, that they cannot now be overthrown, and they let us down at once to legal bed-rock in this case. In fact, they are wholly conclusive as to every point involved in the present argument, and I might well rest these important cases right here; but, to make assurance doubly sure, where so much is indirectly involved, I shall follow the authorities up to the present time, and demonstrate still further and more clearly the correctness of my position and legal propositions.

In the case of Minter *et al.* vs. Crommelin, 18 Howard, 87, decided in 1855, the same doctrine is again held by the Supreme Court of the United States; Justice Catron delivers the opinion. He refers to the case of Polk's Lessee vs Wendell, above mentioned, and sanctions the doctrine there laid down by Chief Justice Marshall (see page 88 of same authority), so that up to this date the doctrine I am contending for has not been shaken, nor even modified in any particular by this Court.

In the case of Stoddard vs. Chambers, 2 Howard, 284, the same doctrine is recognized and affirmed. Justice McLean delivers the opinion of the Court, and at the close of which, on page 318, he says: "It is true a patent possesses the *highest verity*. It cannot be contradicted or explained by parol; but if it has been fraudulently obtained, or issued against law, *it is void. It would be a most dangerous principle to hold that a patent should carry the legal title, though*

obtained fraudulently or against law. Fraud vitiates all transactions. It makes void a judgment, which is a much more solemn act than the issuing of a patent."

Also, in the case of Morton vs. Nebraska, 21 Wal., page 660–670, the whole doctrine is again examined and approved by this Court. Justice Davis delivers the opinion; and the doctrine, not only as to the invalidity of a patent issued without authority of law, or against law, but also, the doctrine that such an instrument may be attacked in an action of ejectment, is fully sustained; and, in that case, the patent was all regular on *its face*, and parol evidence, or evidence *dehors* the face of the instrument, was necessary to show that the patent was void, and this Court sustains the doctrine in that case, that where a patent is *void*, no matter whether it so appears on the face of the instrument or not, yet it may be shown in an action of ejectment, by evidence of facts, *dehors* the face of the instrument.

In this case, land warrants had been laid on *salt* lands, which were reserved from sale, and at the trial evidence *dehors* the face of the instrument was admitted to show that the lands included in the patent were *salines*, or *salt* lands. The patent itself was perfect and regular on its face, and it was rendered *void* by *extraneous* facts, which were shown on the trial. I think the principles settled in this case are conclusive upon the case at bar, and even go beyond what we are contending for, because the patent here involved is wholly irregular and *void* upon its very face, and even the record underlying the patent was only offered in evidence in the Court below to do away with the *extremely violent presumption* that the claims for which the patent issued, were not located prior to the 9th day of July, 1870. As this patent was issued more than eight years after that date, I do not think that after so long a lapse of time, there could be any such presumption indulged in, however strongly presumptions of law may operate in favor of Government

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States Circuit Court at Denver, Colorado, about two years ago, when Judge Miller was presiding, both this authority and another opinion to the same effect were reviewed by Judge Miller himself touching this question, and the following is his opinion, limiting and explaining his own decisions in these cases, to wit:

Ruling of Hon. S. F. Miller, Associate Justice of the United States Supreme Court, upon the question of what a mining patent grants; given during the trial of the Iron-Mine suit.

At the hour of adjournment, Mr. Macon had propounded to the witness a question, whether, in his opinion, the sheet or body of ore which is found in this region, where the plaintiff's mine is situated, was such a body of mineral matter as constituted a vein or lode, or whether it was more analagous to placer mines. That question was objected to by plaintiff's counsel, the objection being on the ground that the patent from the United States to the plaintiff, concluded that question, because it was a patent for a vein, with the right to follow it in all the incidents which attached to it, and that, therefore, the decision of that question by the Land Office, who issued the patent, was one which, if not entirely conclusive, could not, at least, be questioned in an action at law. It has been decided,—and the main opinion was delivered by myself in the Supreme Court of the United States, and which was the opinion of the whole Court, and which has since been re-affirmed, with this modification—that where the Department of the Interior, the Secretary of the Interior, has failed to act in reference to swamp lands, in any way, it was then a question open to

patents. But even if it were necessary to rebut this presumption by the introduction of the whole record underlying the patent, I maintain that it was admissible in the action of ejectment, to do, and this Morton-Nebraska case settles that question, and so the principles laid down in all of the other authorities above referred to.

This is a late and well considered authority, and ought, of itself, to be decisive as to the present case.

There are some other decisions of this Court that either directly or indirectly support this doctrine; but deeming the authorities already referred to abundantly sufficient, I will briefly notice those supposed to be against us.

The strongest case, perhaps, relied on by the other side is that of Johnson vs. Towsley, 13 Wallace, 72 to 91.

His Honor Judge Miller delivered the opinion of the Court, and the whole doctrine as to the *conclusiveness* of Government patents is reconsidered, and, at first blush, this case might seem to be *indirectly* against us; but, upon a careful examination, is not so, nor is it in conflict with the authorities above referred to. Under the law of Congress upon which that decision was made, a special tribunal was authorized to determine certain questions of fact prior to issuing a patent, and their determination was held final in Courts of law.

Also the case of French vs. Fygar *et al.*, Otto (93 U. S.), pp. 169-173, in which Judge Miller also delivered the opinion of the Court. This was a case growing out of the Missouri swamp lands, and simply re-affirms the doctrine of the case last above referred to, that when it is the duty of the Land Officers to pass judicially on the question as to whether lands are swamp lands or not before issuing a patent, that their decision is conclusive on that question. These decisions have no application to the questions involved in the case at bar.

On the trial of the *Iron-Silver* mine case in the United

States Circuit Court at Denver, Colorado, about two years ago, when Judge Miller was presiding, both this authority and another opinion to the same effect were reviewed by Judge Miller himself touching this question, and the following is his opinion, limiting and explaining his own decisions in these cases, to wit:

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a jury, whether it was swamp land or not; and it was held that the certificate of the Secretary of the Interior to a railroad company whose grant was two years later than the Swamp Land Act, did not preclude the State from asserting and proving, in an action at law, that it was swamp land.

I think the latter case, which I cannot recall now, is much more in point than the former case. I delivered both opinions. In the latter case it was the duty of the Secretary to certify to certain railroads the alternate sections of lands within five miles of their road, when that railroad was laid down and platted on the map as the fixed line of road, filed in the office of the Commissioner of the Land Office. It might just as well be argued that when the Secretary issued a certificate to that railroad, for the land, it was conclusive, that he had conclusively stated that it was not swamp land, as it can be argued here, when a patent has issued for a mine in certain boundaries, which the patent says, gives him a right to the vein or metal, that it is in a vein. It is only inferential, in either way that can be, that the Government, or its officers, have acted upon the question, either that it was swamp land or that it was a mineral vein. The decision first made and first ruled on, rested on an entirely distinct grant of the act of Congress. Nothing appears in the State Department, nor any rules established; nothing appears in the Department of the Interior, nor any rules established and permitted by the Commissioner of the Land Office for the government of the Register and Receiver, but the Act of Congress had made it the duty, not the privilege, of the Secretary of the Interior, to ascertain and certify to the States in which they lie, these swamp lands. The title passed by the statute. We have held that it was a grant *in præsenti*, that the title dated from the date of the statute, and the law made it the duty of the Secretary to say what were swamp lands and what passed, by the statute, to the States. When he did that, when, by any act of his,

which implied necessarily that his attention had been called to the subject, and he had decided that the piece of land was swamp land, that the title related back to the date of the grant, it could not be impeached in a Court of law, whatever inquiries might be made in a Court of chancery, and that the general principles of the chancery Court govern on the subject. Now, there is no provision, no express provision, certainly, that the Register, Receiver, Commissioner of the Land Office, nor the Secretary of the Interior, shall, before issuing a patent, ascertain that a vein exists, and for obvious reasons, these officers are wholly incompetent, or, if not wholly incompetent, as little competent as anybody else in the world, to determine whether a vein does exist or not. * * * * * * * * * * * * *

Now, if I am correct in that, it is impossible that the law makes it the duty of the officers, when about to issue a patent, to ascertain that it is a placer and make a determination upon that subject, for these reasons and others.

Judge Hallett is of the opinion, further, that even were not that true, that the patent may be valid for the superficial area within the lines perpendicularly drawn; but that the patent even then, even if it was the duty of the Land Office to ascertain whether it was a vein, it was not their duty to ascertain whether that vein extended outside of their lines, to the ground outside of these side lines of the described premises, — the Iron mine. I think he is correct in that also; so that any view we can take of it, we think the question is open here, whether at the place where this contest takes place, where this contest has commenced, whether it is a vein there or whether it is not a vein within the meaning of the statute. Of course that overrules the objection to the question so far as it relates to the irrelevancy of the testimony.

The above opinion fully explains the cases reviewed, and all similar cases; and shows clearly that this class of cases has no application to mineral patents, and no bearing on the questions involved in this argument. This review by Judge Miller included the case of Samson vs. Smiley, 13 Wallace, 91 to 92.

The next case of importance is that of Gibson vs. Chonteau, 13 Wallace, 93 to 104. In this case, his Honor, Justice Field, delivers the opinion of the Court. It is there said, *casually*, that "a patent is the Government conveyance. That, if other parties have equities, a Court of equity, in a proper case, will grant relief; but in an action of ejectment, in the Federal Courts, the *legal* title must prevail, and the patent, when *regular on its face*, is conclusive of that title."

This case simply states the general doctrine, which we admit, and merely mentions or hints at the *exception* that it does not apply when the patent is *irregular on its face;* but in the case at bar, the patent is *extremely irregular on its face*. It may further be said, that there was nothing at all in this case to require or call out any opinion as to the *exceptions* to the general rule. The case at bar depends entirely on the *exceptions* to the general rule. We admit the rule to the full extent and rely wholly on the exceptions. Therefore, this authority, although seemingly against us, is really not so, and certainly cannot be held to either *modify* or *overrule* the plain and well settled cases above referred to. No one can, for a moment, contend that such is the case. If all of those venerable and well founded opinions and decisions of the ablest jurists this country has ever produced, are to be overthrown by a mere *implication* or careless *dictum*, when the questions were not actually involved, and when no stress at all was put upon them, and where they were only incidentally, if at all, in issue, there could not be much reliance placed upon the adjudications of the highest tribunal of our country, and the rights

of the people would hang on very frail and uncertain tenures indeed. I repeat, however, that there is no necessary conflict between this opinion of Justice Field, and the opinion of Chief Justice Marshall and Justices Johnson and Thompson, who concur with him in his first opinion on this subject.

I now lay it down as a general rule, fairly deduced from all of these authorities, that in all cases in which a patent is irregular and void upon its face, or where it is wholly void on account of facts *dehors* its face, showing that it has been issued without authority of law, or in violation of law, that any and all such defects and facts may be interposed as a defense in an action of ejectment, without any regard at all to the nature of defendant's rights in the premises in question.

In the case of Sherman vs. Burck, 3 Otto (93 U. S.), pages 209–216, this doctrine is very clearly stated. This was an action growing out of the laws of Congress touching the public lands of California, passed in 1852. Judge Miller delivers the opinion of the Court. At the close of the opinion, at page 216, the following clear and distinct statement is made of the law in this regard, to wit: "It has always been held that an absolute want of power to issue a patent could be shown in a Court of law to defeat a title set up under it; though when a title is merely *voidable* a party may be compelled to resort to a Court of equity to have it so declared." In support of this he refers to

Stoddard vs. Chambers, 2 How., 317.
Eastern vs. Salisbury, 2 How., 426.
Reichart vs. Felps, 6 Wallace, 160.

This draws a very clear distinction as to what defenses may be interposed to a patent in a Court of law, and what cannot be. Where a patent is only *voidable*, and not absolutely void, it can only be attacked in a Court of equity;

but where, from any cause or for any reason appearing on the face of the instrument or otherwise, it is wholly void, it may be attacked in a Court of law.

This case, in principle, simply re-affirms the doctrine of Chief Justice Marshall, in 9 Cranch., 87-102, and fortifies that case, which is the foundation of all subsequent cases in regard to this matter. This last case was decided in 1876, and brings us right up to the present time.

The case of Moore vs. Robbins, 6 Otto, 530, relied on by the other side, has no application at all to the case at bar. The main point decided on in that case is: "That all control of the Land Department over titles ceases whenever the title has passed from the Government." The general doctrine is also incidentally mentioned as to Courts of equity granting relief where there has been fraud or mistake and the like.

I have now carefully examined all cases of importance which have been decided by the Supreme Court of the United States touching the questions under discussion, up to the present time, and have shown that there has been a uniform series of decisions by this Court for more than half a century sustaining the doctrine we are contending for, without a single conflicting decision, or even a single dissenting opinion of any Judge.

It is true, there does seem to be a little confusion in the authorities sometimes in regard to the *exact line* or *boundary* between cases examinable in Courts of equity exclusively and those examinable in Courts of law, but I have marked out this *line* so distinctly, and cleared up the authorities upon it so thoroughly, that there can be no difficulty now upon that point. In fact, there is an overwhelming drift of authorities in support of our doctrine, which, it seems to me, leaves no doubt at all touching the material questions involved.

II.

California Authorities.

As the learned counsel on the other side have referred to many California decisions, and seem to rely largely upon them, I shall briefly notice the most important cases.

In the case of Durfee vs Plaisted, 38 Cal., 80, it was held: "That if a patent be void on its face, or was issued without authority of law, or if the Government, in whose name the patent issued, had no title, it may be attacked collaterally."

This case declares the same principles for which I have been contending all through this argument, but it further declares that subject to these *exceptions*, no one can attack a patent, who does not connect himself with the same source of title. I shall fully consider this last point under my second proposition.

In Collins vs. Bartlett, 44 Cal., 371, on which plaintiff in error also relies, it was held: "That a party claiming land under a patent from the United States, has the benefit of the *presumption* that the officers rightly performed all of their duties in selling the land and issuing the patent, and that it devolves on the party assailing the patent to show that it was issued without authority of law."

I concede this law, and admit that there is such a presumption, and that it is a reasonable and wise presumption; but it is not a *conclusive* presumption, and may be rebutted by proper evidence.

The case of Weaver vs. Fairchild, 50 Cal., relied on by the other side, simply re-affirms this presumption as to acts of officers, and is of no importance in the case at bar.

In the case of Cruly vs. Martinez, 53 Cal., to which we are referred, the defendant offered to show, to impeach a patent, that the survey had not been published as required by law, and the Court held that as the patent was regular

on its face it was conclusive in an ejectment, and declares the general rule without mentioning the *exceptions*, becanse it was not necessary to do so.

The case of Yount vs. Howell, 14 Cal, 465, also referred to on their side, simply decides in our favor, "that unless a patent is issued without authority, or is *prohibited* by statute, or is void on its face, its operation against the Government and those claiming by title subsequent, cannot be questioned in any collateral suit." This, in rather a negative manner, asserts all we contend for touching the law—at least, asserts the principles we contend for—but leaves us to apply them to their full logical results. This case only re-affirms all preceeding ones on this point

Some other California authorities are referred to by counsel on the other side in their different briefs and arguments, and also some authorities from other States, but I do not deem it necessary to consider them further on this proposition or head, as they in no manner change the doctrine under discussion, or throw any additional light upon it.

This brings me to a discussion of my second and last general proposition.

PROPOSITION SECOND.

It is a general rule of pleading, in actions of ejectment, that the plaintiff must recover on the strength of his own title.

This rule is fundamental and as old as the action itself, and must prevail in this action.

There is another rule which is the counterpart and logical result of the rule above mentioned, to wit: "That the defendant may give in evidence anything that will falsify, break down or overthrow the plaintiff's title."

The defendant need not show that he has any claim

whatever or *even* a shadow of title to the premises in question.

This doctrine has not been questioned for centuries, and hardly will be now by the Court, although the counsel for plaintiff in error do question it; and why? Simply because they claim under a patent from the United States for a placer mining claim. Suppose their action was founded on a solemn decree of a Ccurt of equity, and there was something on the face of the decree itself which, taken in connection with the record of the Court on which the decree was founded, showing that it was void—that the Court had no jurisdiction, would they question the rules I have laid down? Or suppose their title was based on a judgment of a Court of law, and the record underlying the judgment should show that it was void, would they question the defendant's right to show it? The action at bar is based on a Government patent, and the defects on the face of the instrument itself, together with the record of the Land Office on which it is founded, show that it has been issued without the authority of law and in direct violation of the mining acts of Congress and is, therefore, wholly and absolutely void.

But they maintain, that even if it is void, we cannot show it in this form of action, for two reasons—1, Because all the defects do not fully appear on the face of the patent itself; and 2, Because the defendant has not *deraigned* a title from a *paramount* source of title.

To say that we may take advantage of a patent *void* on its face, and not be allowed to take advantage of a patent absolutely void on account of defects *dehors* the face of the instrument, is a *distinction* that does not *distinguish*. What difference does it make how the patent becomes void so it is absolutely *void in law?* If it be legally void, that is sufficient. There is, however, a marked and well defined distinction between a *void* patent and a *voidable* patent, and this is the

point at which to draw the line as to the defense in the case at bar.

In the case of Polk's Lessee vs. Wendell, the patent was all regular on its face; but it was alleged that the land warrants on which it was based were *forgeries*, and the Court in that case intimated that it would be *judicial imbecility* to refuse the other party the right to make such a defense in an action of ejectment; and I think the Court was right.

Here the patent was regular on its face, and the land warrants were regular on their faces, so far as form was concerned; but, by introducing parol evidence, it could be shown that they were forgeries.

A few years ago shrewd counterfeiters forged patents to large tracts of land in Missouri, and they were so perfect and so *regular* on their faces, that it required evidence of circumstances and admissions *dehors* the faces of the counterfeits to determine whether or not they were counterfeits.

I tried some of these actions myself—ejectments—and we were allowed to introduce any evidence to show that the instruments were *forged*. Supposing this patent was a first class counterfeit, and the Court below could not have detected it from an inspection of its face; suppose it had been all regular on its face and perfect in all other respects, and suppose it could have been clearly proved by witness who had heard the confessions of the counterfeiters, or by other legal evidence, *dehors* the face of the instrument, that it was a forgery, and the able counsel for the plaintiff in error had objected to such evidence because the patent was regular on its face and conclusive in an action of ejectment. How absurd! And yet this is the very doctrine they are so earnestly contending for in the case at bar.

II.

We also maintain on this point that the patent is absolutely void on its face, without resort to any extraneous evidence at all.

It was only to rebut the violent presumption of the Court below that the consolidated claims included in the patent had all been located prior to July 9, 1870; that even the record underlying the patent was offered in evidence; and we do not think this presumption should have been indulged in after the lapse of more than eight years; and also that the act of Congress cut it off.

III.

Now, as to the second objection, that the defendant could not assail this patent unless it was absolutely void on its face without showing himself in privity with a common or paramount source of title!

To say the least, this is a most extraordinary proposition in an action of ejectment, and seems to have had its origin on the Pacific coast, and has most likely grown out of some special statute of California in regard to public lands, or some provision of the Code of Procedure of that State in regard to actions of ejectment, as I can find no trace of any such doctrine anywhere else, and if it means what they maintain it does, it absolutely overthrows every *fundamental principle* known to an action of ejectment, both in England and America, and under both common law and Code procedure. Therefore, I characterize it as very extraordinary unless founded on a special statute of that State. But what does it mean? It seems so general, indefinite and uncertain that it will require a decision of this Court to define and explain it. Does it mean that when a plaintiff in ejectment claims under a patent that the defendant cannot attack his patent unless he himself also claims under

another patent for the same premises? Certainly not; but this seems to be what counsel on the other side contend for.

This would exclude all parties who have entered their land or claim and obtained a receiver's certificate for the same, which is made a good and valid title in the State of Colorado by statute, and the Code of said State provides that an action of ejectment may be maintained on such a receipt the same as on a patent—it is a good title anywhere, but is in the nature of an *equitable* title.

This doctrine would also prevent all persons in Colorado who hold *merely possessory* titles to either agricultural lands or mining claims from making any defense at all against *void patents* unless the same were wholly *void* on their *face*. There are literally millions of dollars worth of mining and other property held in Colorado by purely *possessory* titles from the most valuable mines down to mere cabins on the public domain, and the statutes of Colorado declare all of these possessory titles real estate and subject to execution and sale, and redemption therefrom, the same as other real estate; and section eight, page 715, General Laws of Colorado, 1877, provides:

"That any person settled upon any of the public lands belonging to the United States may maintain *trespass quare clausum fregit*, trespass, ejectment, forcible entry and detainer, unlawful and forcible detainer for injuries done to the possession thereof."

This includes possession of the surface of mineral lands, as well as others, and Sec. 12, same page, provides for the possession and the sale of *possessory* rights to town lots, etc., and that the section above referred to in regard to maintaining said actions shall apply to the same.

Sec. 45, p. 537, General Statutes, provides that all such *possessory rights* shall be subject to execution and sale, the same as other real estate, when not held as a homestead;

and Sec. 26, p. 141, provides that "The terms 'land' and 'real estate,' as used in this chapter, shall be construed as co-extensive in meaning with the *terms* 'lands, tenements, hereditaments,' and as embracing mining claims and *other claims* and *chattels real*."

The mining laws of Congress give the Legislatures of the States and Territories full power to regulate mining claims and titles in any manner not in conflict with the laws of the United States, and therefore all of the mining legislation of the State of Colorado not in conflict with the acts of Congress, has the same force and authority as acts of Congress themselves.

See, Secs. 2322 and 2324, Revised Statutes of the United States, pp. 427, 428.

It will therefore be seen that in the State of Colorado all *possessory* rights, from that of the most valuable mine worth millions down to the most humble squatter's cabin on the public domain, is real estate, and all such rights are *vested* rights, which the laws of the State recognize and protect, and any of these rights are sufficient to maintain an action of ejectment upon, both in the State Courts and the United States Circuit Court for the District of Colorado. Now, therefore, if these rights are real estate and vested rights under the laws of Colorado, and not in conflict with the laws of the United States, and upon which actions of ejectment may be maintained, why are they not sufficient to enable the defendant in the case at bar to attack the patent in question in any legal manner? The complaint admits and alleges that defendants are in the actual possession of the premises, and, for the purposes of this case, that allegation and admission is conclusive upon plaintiff in error.

The mining laws of Congress themselves provide that actions of ejectment may be maintained on these *possessory* rights, and all the actions growing out of adverse claims

filed in the Land Office, are actions of ejectment founded wholly on these *possessory* rights; both the State and Federal Courts of Colorado are filled with these actions.

Under the mining laws of Congress all possessory rights are vested rights; and all such rights are purely legal rights—possession is a legal title, not an equitable one, and, therefore, properly belongs to courts of law.

Now, the point I make is this: If the doctrine that defendants must show that they deraign title from a paramount source of title before they can avail themselves of all legal defenses they may have, means that all these possessory rights are derived from the same source that patents are, the doctrine would not be so novel and startling; but, even then, it would be a remarkable doctrine.

Inasmuch as all patents for mineral lands and all *possessory rights* on our public mineral domain grow out of the mining laws of Congress and out of local mining rules and regulations and mining laws of States and Territories, authorized and sanctioned by the mining laws of Congress, I might with great propriety maintain that all these rights spring from the same source, and this would utterly overthrow the position assumed by the counsel for plaintiff in error in this case; but it seems to me that no such doctrine will ever be sanctioned by this Court in any action of ejectment.

What is there in a Government patent that renders it so sacred—sacred even beyond a solemn decree of a Court of chancery—and justifies the overthrowing of wise and salutary rules of pleading and evidence that have been sanctioned in England and the United States for ages, and have been found by this long experience to be useful in the administration of human justice? It does seem to me that our Courts, for some reason or other, are disposed to invest these Government patents with both an unreasonable and unnecessary sacredness and solemnity! It is true, they are for-

midable looking instruments, with the signature of the President of the United States and the great seal attached, and ornamented with considerable *red tape*, and gotten up in grand style; but, after all, they are nothing but mere *quit-claim* deeds from the Government to the patentee, and a very large proportion of them are conceived in fraud, perjury and sometimes forgery, and brought forth in all kinds of iniquity and rascality! This is especially the case in regard to mineral patents such as the one in issue in the case at bar. And this patent may have secret *sins* and *infirmities* enough upon it to damn a thousand such instruments, could they have been brought to light in this form of action!

I simply mention this to show that there is danger of the Courts throwing too much protection around these instruments, and that instead of closing the doors of our Courts to a reasonable and fair investigaton of these instruments with as little cost and delay as possible, the doors of our Courts should be thrown wider open for their thorough examination.

At common law actual possession in an action of ejectment is presumption of the highest title known to the law, and a defendant can stand firmly on this presumption, and fight his adversary, who seeks to dispossess him, with every legal weapon known to the law; and on the public domain, in Colorado at least, actual possession is presumptive evidence of a license, if not of a higher right; and this presumption requires the same evidence to overthrow it that was required to overthrow the presumption of a fee simple title in other lands in other places; and defendants in the case at bar have a right to stand firmly on this presumption, and fight their adversary with every legal weapon known to the law. They were not called upon on the trial to show what title they claimed under. So soon as it was shown that the patent under which plaintiff claimed was abso-

lutely *void* in law, the plaintiff's case wholly broke down, and the Court properly arrested the trial by instructing the jury that the plaintiff could not recover. It makes no difference just how or at what stage of the proceedings the Court declared the patent *void*, if, in fact, it really was void. It would have been a useless ceremony to have gone further with the trial.

Colorado Code—California Doctrine Further Considered.

As this action was tried under the Colorado Code, which is followed in the United States Circuit Courts for that State, it is perhaps necessary to briefly explain the same in regard to actions of ejectment.

Under its provisions, equitable defenses may be interposed in actions of ejectment, but inasmuch as this case was removed to the Federal Court, no equitable defenses could be set up.

So far as the case is concerned, and, also, the one consolidated with it for the purpose of this argument, the common law doctrine touching ejectments apply, except that the Code and statutes of the State provide that all of the actions enumerated above, in my reference to the statutory provisions of said State, may be maintained upon *possessory* rights, as hereinbefore specified. There are some slight modifications of common law procedure in regard to what must be alleged in the complaint.

The plaintiff must allege the nature of his title, whether he claims a fee simple, estate for life or a *possessory* title—by superiority of possessory title on the public domain.

There is nothing in the said Code that interferes with any of the many positions above assumed and maintained, but there are several provisions which seem to be against

the arguments of the other side. Section 247, page 96, provides: "That an action to recover the possession of real estate may be brought in any case when an action of ejectment or a suit of right might be brought at common law, and in any case where the plaintiff claims a legal estate in real property or lands in fee or for life, or for years, or claims the legal right to occupy and possess the same," etc.

And section 249, page 97, provides: "That the plaintiff shall set forth the nature and extent of his estate in the property, and state whether it be in fee, for life, or the life of another, or for a term of years, or if the plaintiff claims the legal right to occupy and *possess* the premises under the local laws and rules of any mining district, or of the United States, the State of Colorado, or otherwise, the complaint shall contain a brief statement of such *possessory* claim, whether the right is claimed by pre-emption, or purchase, or by right of actual prior possession on the public domain of the United States."

Section 250 provides: "That the answer shall either specifically deny the material allegations of the complaint, or it may state generally, as in the complaint, the character of the estate in the premises, or any part thereof, which the defendant claims, or any right of possession or occupancy he claims."

Section 256, page 100, provides: "That where the legal fee is still in the Government of the United States, and the parties claim under possessory titles, the action shall not be affected by reason of the fee remaining in the United States, and where both parties claim under possessory rights, they are limited in their evidence to their respective rights and claims, and the rights and claims of their grantors and privies in interest."

This limitation, however, does not apply in the case at bar, as the plaintiff claims the premises *in fee simple*, and

the rules of evidence are the same as at common law, if not much broader.

This patent, I believe, has eight important exceptions and reservations on its face, yet the plaintiff claims *a fee simple under it;* but defendants are not assigning errors!

I have referred to the Code of Colorado to show the nature of an action of ejectment under it, and its full recognition of all *possessory rights* on the public mineral domain, and that actions of ejectment may be either maintained or defended on these rights; and that defendants in the case at bar were not trespassers on the premises in question but had a legal possessory title to the same. I also referred to the General Statutes of the State for the same purpose. I also wish to show that the California doctrine of "paramount source of title," however wise and salutary it may be under the laws of California, can have no possible application under the laws of Colorado.

REPLY TO ARGUMENTS OF COUNSEL FOR PLAINTIFF IN ERROR.

Jndge Symes, in his printed argument, (page 24,) maintains the doctrine that a defendant, in ejectment, must have *some color of title* before he can attack a patent under which the plaintiff claims. He relies on the case of Minter vs. Commelin, 18 How., 88; and the case of Patterson vs. Tatum, 3 Sawyer, 164.

Prior to July 4, 1866, there was no law of Congress in regard to mineral lands; and all who entered upon the public mineral domain did so as mere intruders; in fact, I believe the act of 1865 expressly prohibited the sale of all mineral lands, and all persons who entered prior to the act of July 4, 1866, were trespassers, so far as the Government was concerned, but as between miners on the public mineral domain, the Courts recognized their possessory rights.

This, however, was all changed by the act of July 4, 1866, the first act throwing open the mineral lands of the United States to exploration and purchase.

Chap. VI, Sec. 2319, p. 427, Revised Statutes of the United States, provides: "That all valuable mineral deposits of in lands belonging to the United States, both *surveyed* and *unsurveyed*, are hereby declared to be *free* and *open* to exploration and purchase by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs and rules of miners in the several mining districts, so far as the same are applicable, and not inconsistent with the laws of the United States."

I have above referred to the section of the acts of Congress authorizing the Legislatures of the mining States and Territories to make laws touching mining claims and mineral lands not in conflict with the laws of Congres.

Now, these laws wholly and absolutely change the relations of the occupants of mineral lands to the Government of the United States, and legalizes their possession of the public domain; and it is absolutely necessary, in order to carry on mining operations, and to develop our mineral domain, without towns, cities, stores, groceries, livery stables, houses for miners, hotels, banks, and the like, in fact, without centers of trade and general business. All of these things are necessary incidents of a mining country, and are all legalized by the acts of Congress and statutes of Colorado, as I have heretofore shown.

The decision in 18 How., above referred to, was made in 1855, and at a time when all occupants of mining lands were mere intruders and trespassers as to the United States. This decision was made eleven years prior to the first act of Congress throwing open our mineral lands to exploration and purchase; and it is the same mistake that has misled,

and is still misleading, members of the bar and many of our Courts.

Under the law prior to July 4, 1866, the doctrine that a defendant in ejectment must show a priority with a common source of title "before he could attack a Government," was, no doubt, sound law; but it is just as *unsound* law since the passage of the act of July 4, 1866.

A large part of all of our mining decisions were made prior to that date, or upon questions accruing before that time, and have little or no application whatever to our present mining laws.

All of the California cases, up to Vol. XXX of the Reports of that State, were prior to the act of July 4, 1866, and have little or no application at all to cases growing out of our present mining laws.

In the case of 3 Sawyer, referred by Judge Symes, Justice Field delivers the opinion, and says: "That where the defendant in an action of ejectment is a mere intruder, not possessing any claim of title from either the Federal or *State* Government, he cannot attack a Government patent." (Page 174.)

In the case at bar, the defendants have a possessory title from both the Federal and State Governments, as I have already shown. A title that amounted to real estate under the laws of Colorado. The only requirement necessary to confer a good possessory title under the statutes of said State is to mark the surface boundaries so as to designate the tract or claim. The lots in the case at bar were well defined and boundaries clearly marked. Examine statutes already referred to.

II.

One of the counsel for plaintiff in error states that $20,000 had been expended on the claims included in the patent in question prior to obtaining said patent. I have not got

the record before me, but if it shows any such sum, or any considerable sum, it was expended for town or city improvements, as this land was occupied as a town site and center of trade long before said patent was issued, and is all covered by the city of Leadville to-day. It is so notorious that it was patented for a town site and not for mining purposes, that there can be no impropriety in my stating this fact. This patent was obtained in a manner not proper for me to state in this argument, and has a history in regard to the rights and homes of hundreds, and I may say thousands, of poor miners that I must not disclose, and only mention this statement from the other side, that such a large expenditure had been made for *mining* purposes by the patentee.

The same counsel also states that it is usual to consolidate different lode claims into one, as these placer claims were consolidated, and to patent them in like manner.

I have never before heard of such a thing, and have never known of the like in the Land Offices of Colorado, and old lawyers who have been in California, Nevada and Utah for the last thirty years, tell me they never saw or heard of such a thing. The idea would simply be laughed at in Colorado.

It is only as to placer claims that the law has been violated and evaded in this manner, and it has rendered placer claims very unpopular with the miners. They generally regard them as swindles! A placer claim under the miners' rules and customs of California Gulch Mining District, in Colorado, where these claims were situated, was limited to 500 feet ~~square~~; and these rules are still in force, in so far as they do not conflict with the laws of Congress, or of the State of Colorado. Miners' rules always made placer claims very small, and ~~they~~ are bitterly opposed to large claims.

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Conclusion.

As the mining claim for the patent in question was issued as an *entirety*, the patent must either stand or fall as to the whole claims. There is no manner in which this matter can be divided. The United States Circuit Court for Colorado holds that all possessory claims and titles *merge* in a patent, and end; and whether this doctrine be correct or not this patent is either wholly good or wholly bad!

What may be the condition of the patentee and his grantees beyond this patent, is not now for this Court to inquire.

This has simply been a case where, "Vaulting greed has overleaped itself."

T. A. GREEN,
For Defendants in Error.

Thos. A. Green
Of Counsel.